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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 454

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ETC., AND FARMERS UNION CO-OPERATIVE GIN COMPANY, APPELLANTS,

vs.

WILLIAM LOWE, DOING BUSINESS UNDER THE TRADE NAME OF CAPITOL HILL GIN COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA

FILED OCTOBER 22, 1929

(34,585)

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[fols. a & 1-3] Citation, in usual form, showing service Rainey, Flynn, Green & Anderson et al., filed September 12, 1929, omitted in printing.

[fol. 4]

IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

Equity. No. 1030

WILLIAM LOWE, Doing Business under the Trade Name of Capitol Hill Gin Company, Complainant,

vs.

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, C. C. Childers, Fred Capshaw, and E. R. Hughes, Constituting the Corporation Commission of the State of Oklahoma, and Farmers Union Cooperative Gin Company, a Corporation, Respondents

BILL OF COMPLAINT—Filed April 9, 1929

William Lowe, doing business under the trade name of Capitol Hill Gin Company, brings this bill of complaint against the Corporation Commission of the State of Oklahoma, C. C. Childers, chairman, and Fred Capshaw and E. R. Hughes, members of the Corporation Commission of the state of Oklahoma, and Farmers Union Cooperative Gin Company, and each of them, and alleges the following:

I

That complainant, William Lowe, is now and was at all times hereinafter mentioned, engaged in and duly authorized to engage in the operation of a cotton gin in Capitol Hill at Oklahoma City, Oklahoma, under the trade name of Capitol Hill Gin Company, and under a license duly and regularly issued to him by said Corporation Commission of the State of Oklahoma, under and by virtue of Article IV, Chapter 20, Compiled Laws of Oklahoma of 1921, as

amended by Chapter 191 of the Session Laws of Oklahoma of 1923.

That the Corporation Commission of the State of Oklahoma is and was at all times hereinafter mentioned, a commission created by the Constitution of the State of Oklahoma, having its offices, headquarters and principal place of business in the City of Oklahoma City, County of Okla- [fol. 5] homa and State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and that the respondents, C. C. Childers, Fred Capshaw and E. R. Hughes, are and at all times hereinafter mentioned were the duly elected, qualified and acting members of said Commission with headquarters in said city of Oklahoma City, Oklahoma County, Oklahoma.

That the respondent gin company is a domestic corporation of the State of Oklahoma, organized and existing under and pursuant to Article XIX of Chapter 34 of the Compiled Statutes of Oklahoma of 1921.

II

That this is a suit in equity between citizens of the same State arising under and involving the construction and application of the Constitution and laws of the United States and the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000.00).

III

That under and by virtue of Section 3712 of Chapter 20 of Article IV, Compiled Statutes of Oklahoma of 1921, cotton gins are public utilities and the operation of the same for the purpose of ginning seed cotton is a public business and that complainant, in the operation of his said gin at Capitol Hill, Oklahoma, is engaged in a public business, and that the said cotton gin is a public utility.

IV

That under and by virtue of Section 3715 of said chapter and article, the Corporation Commission is vested with the power and authority and is charged with the duty of regu-

lating and controlling cotton gins and all matters relating to the performance of public duties, with power to fix rates, rules, charges and regulations to be observed by complainant and by all persons, firms or corporations operating gins [fol. 6] in the State of Oklahoma, and that by virtue of Section 3717 of said chapter and article said Corporation Commission is vested with the power and authority to enforce its orders against any person, firm or corporation maintaining or operating a gin or gins, by the imposition of fines and penalties for the violation of any of its said orders.

V

That said Commission, pursuant to the authority vested in it, has promulgated rates and charges applicable to all engaged in the ginning business.

VI

That under the provisions of Section 3713 of said chapter and article no person, firm or corporation in the State of Oklahoma is permitted to maintain or operate a gin or gins for the purpose of ginning seed cotton without first having secured a license from the Corporation Commission, and under the provisions of Section 3714 of said chapter and article, as amended by Chapter 191 of the Session Laws of 1923, all persons, firms and corporations are prohibited from constructing or installing, and the Corporation Commission is prohibited from licensing, any new gin plant until satisfactory showing shall have been made to the said Commission that said gin is a needed utility and that the proposed corporation, firm or individual is a competent and desirable corporation, firm or individual to establish and operate said gin.

VII

That the respondent gin company has made application to said Corporation Commission of Oklahoma for permission and license to establish and operate a cotton gin at the point known as Packingtown which is a part of Oklahoma City; that is, is a part of the community of Oklahoma City,

Oklahoma, whether within or without the corporate limits of said city, and said point at which such gin is proposed [fol. 7] to be established and operated is about two and one-half miles from the gin of complainant at Capitol Hill, Oklahoma.

That complainant also owns and operates a gin at Wheatland, Oklahoma, which is a point about ten miles from the proposed location of said gin at Packingtown, Oklahoma, and said gins of complainant at Capitol Hill and Wheatland and the proposed gin to be located at Packingtown will all be in the same cotton raising territory, serving such territory, and will all be in competition for the gining of cotton so raised in such territory.

That the establishment and operation of such gin at Packingtown by said respondent gin company will serve and draw to it the patrons of complainant in said territory and will be an injurious invasion of complainant's property rights by impairing the business of complainant, and will deprive him of his property without due process of law and will deny him the equal protection of the laws in violation of and contrary to the Fourteenth Amendment to the Constitution of the United States and will impair complainant's franchise in violation of Section 10, Article I of the Constitution of the United States.

VIII

That the respondent company is organized as a cooperative corporation under the provisions of Article XIX, Chapter 34, Compiled Oklahoma Statutes of 1921, as amended by Chapter 167 of the Session Laws of Oklahoma of 1923, which authorizes ten or more persons to form a corporation for the purpose of conducting, among others, an agricultural or horticultural business upon a cooperative plan; that under said law such corporation is required to apportion, and pay a portion of the profits of the corporation to its members ratably upon the amount of the products sold to the corporation by its members and the amounts of the purchase of members from the corporation, and such corporation is authorized by said law to apportion a part of of such profits to non-members of the corporation upon [fol. 8] the amounts of their purchases and sales from or to the corporation.

This law, as construed and applied by said Corporation Commission, authorized respondent company to engage in the business of ginning seed cotton as a public utility under Article IV, Chapter 20, Compiled Oklahoma Statutes 1921, as amended by Chapter 191 of the Session Laws of Oklahoma of 1923.

IX

That the respondent company is not qualified or competent to receive a license or construct and operate a gin because of the mandatory provisions of the law under which it is organized, requiring it to apportion its profits to its members ratably and empowering it to apportion its profits to its members ratably and empowering it to apportion its profits to its non-members ratably, upon the amount of the products sold to the corporation by its members and the amounts of the purchases by the corporation from its members, as such apportionment of said profits would and does constitute a rebate to said members and non-members upon the charges made by said respondent for ginning the cotton of said members and non-members under rates prescribed by the Corporation Commission, and the granting of such rebate would be contrary to the Constitution, laws and public policy of this state and contrary to and in violation of the Constitution, laws and public policy of the United States.

X

That if the respondent gin company is granted a license and permitted thereunder to maintain and operate a gin at Packingtown, Oklahoma, it will do so under more favorable terms than are accorded to complainant, since under the mandatory provisions of the laws of the State of Oklahoma authorizing respondent company's incorporation, it, although engaged in a public business, will be compelled to [fol. 9] grant such refunds and rebates to its members and have the right and privilege to make such refunds and rebates to its non-members or patrons upon the amount of their patronage.

That your complainant being prohibited from making refunds and rebates and being compelled in the performance of his public duties to charge rates prescribed by the Corporation Commission, will compete with respondent gin

company upon unequal terms, and under greater burdens than are imposed upon respondent gin company, in violation of both the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and in violation of Section 10, Article I of said Constitution, and should complainant charge lesser rates than those prescribed by said Corporation Commission, he would subject himself to heavy fines and penalties provided for the violation of the Commission's orders and established rates, and would also, by charging less than the prescribed rate or by rebating or refunding a portion of the charge made, violate the laws and public policy of the State of Oklahoma.

That the licensing of or the operation of a gin at Packingtown, Oklahoma, by respondent gin company and the method of conducting its business, as aforesaid, is inconsistent with and repugnant to the provisions of Article IV, Chapter 20, Compiled Laws of Oklahoma, 1921, as amended by Chapter 191 of the Session Laws of 1923.

XI

That as aforesaid respondent gin company heretofore, to-wit; on the 8th day of March, 1929, filed its application or petition with said Corporation Commission for a license authorizing it to construct and operate a gin at Packingtown, Oklahoma; that this complainant had no notice thereof and still being without such notice, said application of respondent gin company came on for hearing before said Commission on the 18th day of March, 1929, and said Commission took same under advisement.

[fol. 10] Complainant learned of such hearing of the Corporation Commission shortly after the conclusion of said hearing and immediately upon learning of such hearing filed his application to re-open said case and to have a rehearing thereon for the purpose and to the general end that no order may be made granting a license, and that an order denying and refusing a license to respondent gin company to establish and operate such gin at Packingtown, Oklahoma, might be made and entered; a copy of which application is herewith filed, marked Exhibit "A" and made a part hereof.

That as a part of such application to re-open said case, complainant also filed a protest to the granting of a license

to respondent gin company to establish and operate a gin at Packingtown, Oklahoma, a copy of which is hereto attached, marked Exhibit "B" and made a part hereof.

That on the 8th day of April, 1929, such application to reopen said case came on for hearing before said Corporation Commission, and said Commission denied said application and refused to reopen or rehear said case and then announced that it would make an order granting such license to the said respondent gin company to establish such gin at Packingtown, Oklahoma. That said license, however, has not yet been actually issued.

XII

That said Corporation Commission, unless restrained and enjoined by this Honorable Court, will issue the license prayed for to respondent gin company to establish a gin at Packingtown, Oklahoma, and said respondent gin company will establish and operate said gin, which will result in irreparable damage and loss to this complainant by the impairment, injury to and practical destruction of complainant's business, for all of which there is no adequate remedy or relief at law, although said threatened action will also impair complainant's franchise in violation of Section 10, Article I of the Constitution of the United [fol. 11] States, and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, since complainant is without adequate remedy save in a court of equity, complainant prays:

1. That the respondents, Corporation Commission of the State of Oklahoma, C. C. Childers, Fred Capshaw and E. R. Hughes, and each of them, their assistants, agents, attorneys, and employes, and all persons acting through or under them, be enjoined and restrained from issuing the said license to respondent company.

2. That respondent, Farmers Union Cooperative Gin Company, its agents, attorneys and employes, and all persons acting through or under it, or them, be enjoined and restrained from the establishment, maintenance or operation of a cotton gin at Packingtown, Oklahoma.

3. That this Court set this cause for hearing on application for an interlocutory injunction, and that on said hearing the Court issue its injunction preliminary until final hearing and perpetual thereafter.

4. That in the meantime, a temporary restraining order be issued in accordance with its prayer for said preliminary injunction, in order that the said complainant will not suffer the irreparable injury and damage that it otherwise would suffer, as is alleged and charged in this bill of complaint.

5. That on said final hearing said preliminary injunction be made perpetual as aforesaid.

6. That complainant may have such other and further relief as may be just, equitable and proper.

7. And this complainant prays that there shall be issued out of this Court, directed to the Marshal, a writ of subpœna to be served upon the respondents directing them upon a certain day and under certain pain to be and appear before this Honorable Court and then and there true, direct [fol. 12] and perfect answer to make to the premises, but not under oath—answer under oath to be expressly waived —and further to stand to, abide and perform such other and further direction as may be conformable to equity and good conscience as to this Court shall seem meet.

And your complainant will ever pray.

William Lowe, Complainant, by Rainey, Flynn, Green & Anderson, His Attorney-.

Duly sworn to by William Lowe. Jurat omitted in printing.

[fol. 13] EXHIBIT A TO BILL OF COMPLAINT

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

No. 9196

In re: Application of FARMERS UNION GIN COMPANY for a Gin License at Packingtown, Oklahoma

Application to reopen case

Comes now William Lowe and respectfully shows to this Honorable Commission that he is the owner of a cotton gin

at Capitol Hill in Oklahoma City, Oklahoma, and that he is operating said gin under the trade name of Capitol Hill Gin Company. That the application of the Farmers Union Gin Company for a license to construct and operate a cotton gin at Packingtown in Oklahoma City, Oklahoma, was filed with this Commission on the 8th day of March, 1929 and that said application was set for hearing on Monday, March 18, 1929, and that on said date no protest having been filed, this Commission too, said application under advisement and has not as yet taken any action on said application.

Your petitioner respectfully shows that he did not receive any notice of said hearing and therefore had no opportunity to appear and protest the granting of said license; that he desires to protest the same both on the grounds that the same is not a needed utility and that the applicant is not a competent person to engage as a public utility in the business of ginning seed cotton.

Wherefore. petitioner respectfully prays this Honorable Commission that it re-open said case and set the same for hearing and permit him to file his written protest therein, copy of said protest being hereto attached, marked Exhibit "A" and made a part hereof.

William Lowe, by Rainey, Flynn, Green & Anderson, Attorneys.

STATE OF OKLAHOMA,
Oklahoma County, ss:

William Lowe, of lawful age, being first duly sworn, on oath deposes and says that he has read the foregoing application to re-open case and knows the contents thereof, and that the allegations and statements therein contained are true and correct.

William Lowe.

Subscribed and sworn to before me this — day of March, 1929. My commission expires Nov. 4, 1929. Beulah Simmons, Notary Public. [Seal.]

[fol. 14] EXHIBIT B TO BILL OF COMPLAINT

BEFORE THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA

No. —

In re: Application of FARMERS UNION COOPERATIVE GIN Company for a Gin License at Packingtown, Oklahoma

Protest of William Lowe

Comes now William Lowe and protests and objects to the granting and issuance of a license to Packingtown to construct and operate a gin at ——, Oklahoma, and as grounds therefor states:

Protestant William Lowe is engaged in the business of operating a cotton gin in the City of Oklahoma City, Oklahoma, under a license duly issued to him by the Corporation Commission of the State of Oklahoma on the 1st day of May, 1924, under and pursuant to the provisions of Article 4, Chapter 20, Compiled Oklahoma Statutes 1921, as amended by Chapter 191 of the Session Laws of 1923. That under and by virtue of said Chapter 20, cotton gins are public utilities and the operation of the same for the purposes of ginning seed cotton is a public business and that protestant, in the operation of his said cotton gin at Oklahoma City, Oklahoma, is engaged in a public business, and that the said cotton gin is a public utility; that under and by virtue of Section 3715 of the Chapter and Article aforesaid, the Corporation Commission is vested with the power and authority and is charged with the duty of regulating and controlling its cotton gin and all other cotton gins in all matters relating to the performance of such duties and the charges therefor, with the power to fix rates, rules, charges and regulations to be observed by it and by all other persons operating gins in the State of Oklahoma, and that by virtue of Section 3717 of said Chapter and Article, said Corporation Commission is vested with power and authority to enforce its orders against any person, firm, company or corporation maintaining or operating a gin or gins by imposing fines against him or them for the violation of any of its said orders.

Protestant further alleges that under the provisions of Section 3713 of said Chapter and Article, no person or persons or corporation or corporations, in the state of Oklahoma are permitted to maintain and operate a gin or gins for the purpose of ginning seed cotton without first having secured a license for such purpose from the said Corporation Commisison, and that by virtue of Section 3714 of said Chapter and Article as amended by Chapter 191 of the Session Laws of 1923, all persons and corporations are prohibited from constructing or installing, and the Corporation Commission is prohibited from licensing any new gin plant, until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility and that the proposed corporation, company, firm, corporation or individual is a competent and desirable company, firm, corporation or individual to establish and operate said gin.

Protestant further alleges that there are now four gins located and being operated in the town of Oklahoma City, Oklahoma, that said gins are sufficient in number and capacity to properly and adequately gin all of the cotton raised in the vicinity of Oklahoma City, Oklahoma, and that there is no necessity for the establishment and operation of another gin at said place, and the gin so sought to be licensed by this Commission and run by Farmers Union CoOperative Gin Company is not a needed utility; that the granting of such license to and the establishment of such a gin by said Farmers Union CoOperative Gin Co. is and will be desturctive of protestant's business and will deprive [fol. 15] him of his property without due process of law and will deny the equal protection of the laws in violation of and contrary to the Fourteenth Amendment to the Constitution of the United States.

Protestant further alleges that the applicant Farmers Union CoOperative Gin Company is organized under the provisions of Article 19, Chapter 34, Compiled Oklahoma Statutes of Oklahoma, 1921, as amended by Chapter 167 Session Laws 1923, authorizing ten (10) or more persons to form a corporation for the purpose of conducting among others, an agricultural or horticultural business upon a cooperative plan; that under said law, after setting aside a surplus or reserve fund and payment of dividends at a rate not to exceed 8% per annum, the remainder of the profits

of the corporation must be apportioned and paid to its members ratably upon the amount of products sold to the corporation by its members and the amount of the purchases by its members form the corporation, and such corporation may apportion such profits to non-members upon the amount of their purchases and sales from and to the corporation.

Protestant says that said Article 19, Chapter 34 Compiled Oklahoma Statutes 1921, as amended by Chapter 167 Session Laws 1923 (Sec 5637 to 5652 inclusive) do not authorize a cooperative corporation organized thereunder to become a public utility and engage in the business of ginning seed cotton, under Article 4, Chapter 20, C. O. S. 1921, as amended by Chapter 191 of Session Laws of Oklahoma 1923.

Protestant further says that the applicant Farmers Union CoOperative Gin Company is not qualified or competent to receive a license to construct and to operate a gin because of the mandatory provisions of Section 5648 requiring it to apportion profits to its members ratably upon the amount of the products sold to the corporation by its members and the amounts of the purchases by the corporation from its members, if in fact such provisions could apply to the ginning business, as such apportionment of said profits would constitute a rebate to said members, contrary to the Constitution, laws and public policy of this State, and contrary to the Constitution, laws and public policy of the United States.

Protestant further says that the granting of a license to and the engaging in the operation of a gin by the said Farmers Union CoOperative Gin Co. would impair protestant's franchise by taking a portion of the business that would otherwise go to him; would constitute unfair competition, and the method of conducting its business, as required and authorized by the law under which it was incorporated, would result in discrimination and class legislation in favor of the applicant and against the protestant in violation of and contrary to the Fourteenth Amendment to the Constitution of the United States.

Protestant further says that the licensing of or the operation of said Farmers Union CoOperative Gin Co. gin and the method of conducting its business as required by said Article 19, Chapter 34 C. O. S. as amended by Chapter

167 Session Laws 1923, is inconsistent with and repugnant to the provisions of Article 4, Chapter 20, compiled Laws of Oklahoma 1921, as amended by Chapter 191 of the Session Laws of Oklahoma 1921 as amended by Chapter 191 of the Session Laws of Oklahoma, 1923.

Wherefore protestant prays that this, his protest, be sustained and that the application of Farmers Union Co-Operative Gin Co. for a license to operate a gin at Packingtown, Oklahoma, as prayed for by it, be denied.

William Lowe, Protestant. Rainey, Flynn, Green & Anderson, Attorneys.

[fol. 16] [File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS AND ANSWER—Filed April 26, 1929

Come now the defendants, Corporation Commission of the State of Oklahoma, C. C. Childers, Fred Capshaw and E. R. Hughes, members thereof, and Edwin B. Dabney, Attorney General of the State of Oklahoma, and the Farmers Union Cooperative Gin Company, and for answer herein files this its motion to dismiss and answer the allegations contained in the bill of complaint filed herein as follows, to-wit:

I

Defendants move the court to dismiss the bill of complaint herein for the following reasons, to-wit:

(a) That the bill of complaint and the allegations contained therein are insufficient in law or equity to constitute a basis for the relief sought.

(b) For the reason that this action is prematurely brought under the rule of comity existing and practiced by the Federal courts in their relationship to the state courts including the courts of the State of Oklahoma in that the matters and things contained and alleged in said bill of complaint, with respect to refunding and rebating and dis-

tribution of surplus profits are all practices which come within the jurisdiction of the Corporation Commission of the State of Oklahoma, which has authority upon complaint [fol. 18] to make and enter orders prohibiting and regulating such practices if found contrary to law.

(c) For the reason that complainant, William Lowe, doing business under the trade name of Capitol Hill Gin Company, has not complained to the Corporation Commission of the State of Oklahoma, or sought relief at the hands of said Commission, looking to the prevention of such practices or contemplated practices as are alleged in said bill of complaint.

(d) For the reason that no constitutional right of said complainant, William Lowe, is shown by said bill to be involved or violated by the contemplated action of defendants herein or any of them.

II

Defendants and each of them further answering, admit that Complainant is engaged in and duly authorized to engage in the operation of the cotton gin at Capitol Hill in Oklahoma City, Oklahoma, under a license duly and regularly issued by the Corporation Commission of the State of Oklahoma under and by virtue of Art. IV of Chap. 20, Compiled Laws of Oklahoma, 1921, as amended by Chap. 191 of the Session Laws of Oklahoma of 1923, and by Chap. 109 of the Session Laws of Oklahoma, 1925.

Defendants and each of them admit that the Corporation Commission of the State of Oklahoma is and was at all times mentioned in said bill of complaint, an administrative body created by the Constitution of the State of Oklahoma having its offices and headquarters and principal place of business in the city of Oklahoma City, Oklahoma County, State of Oklahoma, and within the jurisdiction of the District Court of the United States for the Western District of Oklahoma, and that the defendants, Fred Capshaw, C. C. Childers and E. R. Hughes are, and at all times mentioned, were the duly elected, qualified and acting members of said Commission, with their headquarters in Oklahoma City, Oklahoma [fol. 19] County, State of Oklahoma. Defendants in this connection, however, allege that in addition to the adminis-

trative authority exercised by the Corporation Commission of the State of Oklahoma, do also possess legislative authority and in some instances exercise quasi-judicial authority.

Defendants deny that this is a proper suit in equity between citizens of the State of Oklahoma, arising under and involving the construction and application of the Constitution and laws of the United States and deny that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

Defendants admit that defendant, Farmers Union Cooperative Gin Company is a domestic corporation organized under and pursuant to Article XIX of Chapter 34, Compiled Statutes of Oklahoma, 1921.

Defendants admit that under and by virtue of Section 3712 of Chapter 20 of Article IV, Compiled, Statutes of Oklahoma, 1921, cotton gins are public utilities and that the operation of same for the purpose of ginning seed cotton is a public business and that plaintiff in the operation of his cotton gin at Capitol Hill, Oklahoma City, is engaged in a public business and that the said cotton gin is a public utility. They further admit that under and by virtue of Section 3715 of said Chapter and Article, the Corporation Commission is vested with the power and authority and is charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of such duties and the charges therefor, with power to fix rates, rules, charges, and regulations to be observed by him and all other persons operating gins in the State of Oklahoma, and that by virtue of Section 3717 of said Chapter and Article the Corporation Commission is vested with the power and authority to enforce its orders against any person, firm or corporation maintaining or operating a gin or gins by the imposition of fines against them for the violation of any said orders.

[fol. 20] Defendants admit that under the provision of Section 3715 of said Chapter and Article that no person or persons or corporations of the State of Oklahoma are permitted to maintain or operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the Corporation Commission, and that by virtue of Section 3714 of said Chapter and Article as

amended by Chapter 109 of the Session Laws of 1925 that all persons and corporations are prohibited from the constructing or installing any new gin plant until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility and that the proposed corporation, company, firm, or individual is a competent and desirable corporation, company, firm or individual to establish and operate said gin as may appear in the discretion of said Commission, and that said provisions apply to all persons, firms and corporations and classes with the exceptions set forth by the bill of complaint.

Defendants admit that the respondent gin company has made application to said Corporation Commission of the State of Oklahoma for permission and license to establish and operate a cotton gin at the point known as Packingtown, which is a part of Oklahoma City, and that said point at which such gin is proposed to be established and operated is about two and one half or three miles from the gin of complainant at Capitol Hill, Oklahoma City.

Defendants admit that complainant also owns and operates a gin at Wheatland, Oklahoma, a point about ten miles from the proposed location of the gin at Packingtown, Oklahoma, and that each of said gins will be in competition in the ginning of cotton raised in the general ginning territory surrounding said gins. However, defendants deny that respondent gin company will be or is about to be granted a license authorizing the construction, maintenance and operation of a cotton gin at Packingtown, without a [fol. 21] sufficient showing that a necessity exists for such added gin facility. Defendants therefore deny that the establishment and operation of such gin at Packingtown, by respondent gin company will draw from complainant in said territory any patronage to which complainant is entitled, and further deny that complainant's property rights will be in any wise injured, or he will be denied due process of law or the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, or that complainant's franchise will in any wise be impaired in violation of Section 10, Art. 1 of the Constitution of the United States.

III

Defendants further answering aver the facts to be that respondent gin company has shown a necessity as required by law, for the construction, maintenance and operation of a cotton gin facility at Packington, Oklahoma City, Oklahoma, having shown such necessity under the terms and provisions of the statute with respect to licensing gins, and respondent is entitled to receive a license at the hands of the Corporation Commission of the State of Oklahoma.

IV

Defendants admit that respondent company was organized as a co-operative corporation under the provisions of Art. 19, Chap. 34 Compiled Oklahoma Statutes, 1921, as amended by Chap. 167 of the Session Laws of Oklahoma, 1923, which *which* authorizes ten or more persons, firms or corporations to organize for the purpose of conducting, among others, an agricultural or horticultural business upon a cooperative plan.

[fol. 22] Defendants further admit that under said law, such corporations as are organized under the terms and provisions of said statute are required to apportion and distribute a certain portion of the surplus profits of the corporation to its members ratably upon the amount of the products sold to the corporation by its members, and the amount of purchases by members of the corporations, and that such corporations are authorized to apportion a part of said profits to non-members of the corporation upon the amount of their purchases and sales from or to the corporation. Defendants, deny however, that the Corporation Commission has construed the terms and provisions of such statute so as to permit the distribution of the profits earned and received from the ginning of cotton among the stockholders on a ratable basis.

Defendants deny that the provisions of Art. 19, Chap. 34 Compiled Oklahoma Statutes, 1921, as amended by Chap. 167, Session Laws, Oklahoma, 1923, in any wise authorize respondant gin company to distribute or apportion any part of its profits to stockholders ratably upon the basis of the amount of patronage of such stockholders.

V

Defendants further answering, deny that respondent gin company is not a qualified or competent concern to receive a license or construct, maintain and operate a gin because of any of the provisions of the law under which it is organized requiring it to apportion its profits earned and received from products sold to the corporation or its members, and further deny that even though said law might be construed to authorize such a practice, that it in any wise constitutes a rebate to said members and non-members upon the charges made by said respondent for ginning cotton for said members and non-members under rates prescribed by the Corporation Commission, and deny that the granting of such a distribution of such profits would be contrary to [fol. 23] the Constitution or laws or in any wise contrary to public policy or in violation of the Constitution of the United States.

VI

Respondents deny that in case respondent gin company is granted a license and permitted thereunder to maintain and operate a gin at Packingtown, that it will do so under more favorable terms than are accorded to complainant, or that under the provisions of the laws of Oklahoma authorizing respondent company's incorporation, said respondent would in any wise be compelled to grant any refund or rebate to its members, or have the right or privilege to make such refund or rebate to its members or non-members or patrons upon the amount of their patronage. Respondent therefore denies that complainant will be unable to compete with respondent gin company upon equal terms and under greater burdens than are imposed upon respondent gin company, or that the granting of the license sought to be enjoined would be in any wise violative of the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States or in violation of Sec. 10, Art. 1 of said Constitution.

VII

That respondent, Corporation Commission admits that it has signified an intention to issue the license prayed for

to respondent gin company authorizing it to establish a gin at Packingtown, Oklahoma, and admits that respondent gin company will establish and operate said gin, but denied that the establishment, maintenance and operation of said gin will in any wise result in irreparable damage or loss to complainant by the impairment, injury to or practical destruction of complainant's business, and further denies complainant's allegation to the effect that there is no adequate remedy or relief at law.

[fol. 24] VIII

The defendants further answering aver that the cotton production industry including the gathering, picking, ginning, and stowing and marketing thereof is a leading agricultural pursuit in so far as values are concerned within the State of Oklahoma; that the ginning, marketing and processing of said product is one that is subject to continual abuse in that a large proportion of the gins in the State of Oklohoma have been constructed and are operated by those persons who are also interested in the purchase of cotton seed extract from the cotton as well as in the purchase of the staple after it is ginned and processed for marketing; that such concerns as are engaged with cotton seed business as well as the cotton buying business and also operating gine in connection therewith have an advantage amounting to a virtual monopoly of such products within the State of Oklahoma.

That the State of Oklahoma through legislative enactments throughout the past has by the adoption of legislation designed to foster and encourage agriculture, enacted statutes permitting all persons as well as those engaged in agriculture and horticulture to organize for the purpose of conducting agricultural, dairy, live stock, irrigation, horticultural, mercantile, manufacturing, mechanical, and industrial business upon a cooperative plan; that pursuant to said policy the Legislature of the State of Oklahoma has enacted the statute complained of. That portion of the 1919 statutes aforesaid, subject to the attack of complainant in Section 5648 Compiled Oklahoma Statutes, 1921, which reads and provides as follows:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

[fol. 25] (3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporations; provided, that if the bylaws of the corporation shall so provide the directors may apportion such earnings and profits in part to non members upon the amounts of their purchases and sales from or to the corporation."

Respondents, with respect to the terms and provisions of Section 5649 set forth above, aver that the language contained in said section, and particularly subdivision 3 thereof, are in no wise contrary to or incompatible with the public utility statutes of the State of Oklahoma, which authorize the Corporation Commission to regulate and control cotton gins in all matters relating to the performance of their public duties or the power to fix rates, rules, charges and regulations to be observed by all persons, firms or corporations operating gins in the State of Oklahoma.

Having fully answered the matters and things alleged in said bill of complaint, the defendants and each of them pray this Honorable Court that said bill of complaint be dismissed, and that the relief prayed for therein be in all things denied, and that they go hence with their costs without day.

E. S. Ratliff, for Corporation Commission. S. P. Freeling, for Farmers Union Cooop. Gin —.

[fol. 26] *Duly sworn to by A. P. Freeling and E. A. Ratliff. Jurats omitted in printing.*

[File endorsement omitted.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Title omitted]

AGREED STATEMENT OF FACTS—Filed April 26, 1929

It is stipulated and agreed by and between the parties hereto that the following facts are agreed to and that either of the parties may introduce any additional evidence that may be relevant or material.

I

That William Lowe is engaged in the cotton ginning business, doing business under the trade name of Capitol Hill Cotton Gin, in Capitol Hill, Oklahoma City, Oklahoma; that said gin is operated under and by virtue of a license duly isued by the Corporation Commission of the State of Oklahoma under and by virtue of Article 40, Chapter 7 Compiled Oklahoma Statutes of 1921, as amended by Chapter 191 Session Laws of Oklahoma, 1923. That C. C. Childers, Fred Capshaw and E. R. Hughes are the duly elected, qualified and acting members of the Corporation Commission of the State of Oklahoma, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00

II

That the Farmers Union Cooperative Gin Company is a domestic corporation of the State of Oklahoma, organized and existing under and pursuant to Article 19 of Chapter 34 Compiled Oklahoma Statutes of 1921.

[fol. 28] That Section 3712 of Chapter 20 of Article IV, Compiled Statutes of Oklahoma of 1921, declares cotton gins to be public utilities and the operation of the same for the purpose of ginning seed cotton is a public business.

That said Corporation Commission pursuant to the authority vested in it under the laws of the State of Oklahoma, has promulgated rates and charges for the ginning of seed cotton, which are applicable to all engaged in the cotton ginning business for the general public.

That on the 8th day of March, 1929, Respondent, Farmers Union Cooperative Gin Company, filed its application

with the Corporation Commission for a license to operate a cotton gin as a public utility at a point known as Packingtown, Oklahoma, which is a part of Oklahoma City; that is, a part of the community of Oklahoma City, Oklahoma, whether within or without the corporate limits of said city. That said place where said gin is proposed to be located and operated is about two and one-half miles from complainant's gin located at Capitol Hill, Oklahoma; that said complainant also owns and operates a cotton gin at Wheatland, Oklahoma, which is an unincorporated town situated about ten miles from the proposed location of said gin at Packingtown, Oklahoma, and that complainant's said gins at Capitol Hill and Wheatland and the proposed gin to be located at Packingtown, Oklahoma, will all be in the same cotton producing territory, serving such territory, and will all be in competition for the ginning of cotton grown in such territory.

III

That subsequent to the filing of the application for a gin license by the Farmers Union Cooperative Gin Company for a gin at Packingtown, Oklahoma, on the 8th day of March, 1929, this complainant filed its written objection and protest with the Corporation Commission of Oklahoma, against the granting of said license, and as grounds therefore alleged that the same was not a needed utility and that the applicant, Farmers Union Cooperative Gin [fol. 29] Company, being organized under and pursuant to the provisions of Article 19, Chapter 34, Compiled Statutes of Oklahoma, 1921, as amended by Section 167, Session Laws of 1923, is not authorized to be a public utility and to engage in the business of ginning seed cotton under Article 4, Compiled Oklahoma Statutes 1921, as amended by Chapter 191 of Session Laws of 1923, and that to grant said license and to permit said Farmers Union Cooperative Gin Company to operate its said gin as a public utility thereunder would result in discrimination and class legislation in favor of the applicant and against protestant, in violation of and contrary to the Fourteenth Amendment of the Constitution of the United States.

IV

That the Corporation Commisison of the State of Oklahoma has heard the application of Farmers Union Cooperative Gin Company of Packingtown, Oklahoma, for said license, and has heard and considered the objection and protest of the complainant, William Lowe, and has threatened to and will, unless restrained and enjoined by the United States Court for the Western District of the State of Oklahoma, issue the license prayed for to respondent gin company, to establish and operate a gin at Packingtown, Oklahoma, and said respondent will establish and operate said gin.

Dated this 26th day of April, 1929.

William Lowe, by Rainey, Flynn, Green & Anderson, Attorneys. E. S. Ratliff, for Corp. Commission. Farmers Union Coop. Gin —, by Freeling & Box, Attys.

[File endorsement omitted.]

[fol. 30] In United States District Court

In Equity. No. 1030

William Lowe, Doing Business under the Trade Name of Capital Hill Gin Company, Complainant,

vs.

The Corporation Commission of the State of Oklahoma, C. C. Childers, Fred Capshaw, and E. R. Hughes, Constituting the Corporation Commission of the State of Oklahoma, and Farmers Union Co-operative Gin Company, Respondents

Final Decree—Filed June 22, 1929

This cause coming on to be heard upon the application of the plaintiff for a temporary injunction, pursuant to assignment and notice, it is thereupon agreed by counsel for the parties that the cause be also submitted for final decree; and on consideration of the pleadings, stipulation of facts and the arguments of counsel, it is by the court ordered, adjudged and decreed:

That the defendant, the Corporation Commission of the State of Oklahoma, be and it is hereby perpetually enjoined from issuing a license to the Farmers Union Co-operative Gin Company, a public utility in the State of Oklahoma, to conduct or operate a cotton gin at Packingtown, within or without the corporate limits of the City of Oklahoma City, State of Oklahoma, for and upon the ground that by the laws of said state, applicable to said company, said company is required to apportion and pay a part of its net earnings to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the said com-
[fol. 31] pany, and its directors are authorized, if so provided by its by-laws, to apportion such earnings and profits to non-members upon the amounts of their purchases and sales from or to said company, and that such requirements upon and privileges of said company, constitute an unreasonable and arbitrary discrimination in competitive ginning business and operations in favor of the said company and against the plaintiff, and would if said license be issued, effect a denial to the plaintiff of the equal protection of the laws, in violation of the Constitution of the United States.

That the costs of this suit be taxed to and against the defendants.

To said decree and every part thereof the defendants, and each of them, at the time duly excepted and except.

Dated June 22, 1929.

John H. Cotteral, Circuit Judge. John C. Pollock, District Judge. Edgar S. Vaught, District Judge.

[File endorsement omitted.]

[fol. 32] In United States District Court

Notice and Petition for Appeal—Filed July 20, 1929

To the Honorable Edgar S. Vaught, United States District Judge for the Western District of Oklahoma:

The above named defendants, The Corporation Commission of the State of Oklahoma, C. C. Childers, Fred Capshaw and E. R. Hughes, constituting the Corporation Commission of the State of Oklahoma, and Farmers Union Co-operative Gin Company, feeling themselves aggrieved by

the order, judgment and decree rendered and entered in the above entitled cause on the 22nd day of June, 1929, do hereby appeal from the said decree to the Supreme Court of the United States, for the reasons set forth in the assignment of errors filed herewith, and they pray that said appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the Supreme Court of the United States *of the United States* sitting at the City of Washington in the District of Columbia, as under the rules in such cases made and provided; that a bond in appeal and supersedeas be fixed in such sum as the court may deem proper, and that the court make all proper orders.

The Corporation Commission of the State of Oklahoma, C. C. Childers, Fred Capshaw, and E. R. Hughes, Constituting the Corporation Commission of the State of Oklahoma, by E. S. Ratliff, their Attorney, and Farmers Cooperative Gin Company, by Freeling & Box, Its Attorneys.

[File endorsement omitted.]

[fol. 33] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed July 20, 1929

Come now the defendants in the above entitled cause and file the following assignment of errors upon which they will rely in their appeal in said cause from the decree rendered by this Honorable Court on the 22nd day of June, 1929:

1. The District Court of the United States for the Western District of Oklahoma erred in holding that Article XIX, Chapter 34 Compiled Oklahoma Statutes of 1921, as amended by Chapter 167 of the Session Laws of Oklahoma, 1923, is unconstitutional and void, and erred in perpetually enjoining the Corporation Commission of the State of Oklahoma from issuing a license to the Farmers Co-operative Gin Company in the State of Oklahoma to construct or operate a cotton gin at Packingtown, within or without the corporate limits of the City of Oklahoma City, State of Oklahoma, upon the ground that by the laws of said State applicable to said company, said company is required

to apportion and pay a part of its net earnings to its members ratably upon the the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the said company, and upon the ground that its directors are authorized, if so provided by its bylaws, to apportion such earnings and profits to non-members upon the amounts of their purchases and sales from or to said company, and that the said court erred in holding that such requirements upon and privileges of said company constitute an unreasonable and arbitrary discrimination in competitive ginning business and operations in favor of the said company and against the plaintiff, and that the said court erred in holding that if such license be issued it would be in effect a denial to the plaintiff of the equal protection of the law and a violation of the Constitution of the United States.

[fol. 34] Wherefore the defendants pray that said above decree be reversed, and that the said District Court of the United States for the Western District of Oklahoma be ordered to enter a decree setting aside its said order, and dismissing the bill of the complainant as prayed for, together with all other, further and suitable relief.

The Corporation Commission of the State of Oklahoma, C. C. Childers, Fred Capshaw, E. R. Hughes, by E. S. Ratcliff, Their Attorney. Farmers Union Co-operative Gin Company, by Freeling and Box, Its Attorneys.

[File endorsement omitted.]

[fol. 35] In United States District Court

Order Allowing Appeal—Filed July 20, 1929

On this 20th day of July, 1929, on motion and petition of the defendants, it is hereby ordered by the Court that an appeal to the Supreme Court of the United States of America, from the Final Decree heretofore filed and entered herein on the 22nd day of June, 1929, be and the same is hereby allowed, and that the bond on appeal be fixed in the sum of One Thousand Dollars.

Edgar S. Vaught, United States District Judge.

[File endorsement omitted.]

[fol. 36] Bond on appeal for $1,000, approved and filed October 4, 1929, omitted in printing.

[fol. 37] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed Oct. 22, 1929

In accordance with Rule eleven of this honorable court appellants hereby specify the following as points upon which it will rely for a reversal of the judgment of the United States District Court for the Western District of Oklahoma:

I

That the said District Court of the United States for the Western District of Oklahoma committed error in perpetually enjoining the Farmers Union Co-Operative Gin Company in the State of Oklahoma from constructing or operating a cotton gin at Packingtown in the city of Oklahoma City, said State, for and upon the grounds that by the laws of said State applicable to said company, said company is required to apportion and pay a part of its net earnings to its members ratably upon the amounts of the products sold to the corporation by its members and the amounts of the purchases of members from the said company, and that its directors are authorized if so provided by its by-laws, to apportion such earnings and profits to non-members upon the amounts of their purchases and sales from or to said company.

And that the said court committed error in holding that the requirements of Article 19, Chapter 34, Compiled Statutes of Oklahoma, 1921, as amended by Chapter 167 of the Session Laws of 1923, constitute an unreasonable and arbitrary discrimination in competitive ginning business. And the court erred in holding that if said license be issued it would be in effect a denial to the plaintiff of the equal protection of the laws and in violation of the Constitution of the United States.

[fol. 38] And the court erred in holding that the effect of said law would be to deprive the complainant of the equal protection of the law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

In support of the foregoing points appellant hereby designates the following parts of the record to be printed, which

it thinks necessary for a proper determination of this appeal, and hereby requests the Clerk of The Honorable United States Supreme Court to have the same printed under his supervision:

1. Citation and Service.
2. Bill of Complaint.
3. Motion to Dismiss and Answer.
4. Agreed Statement of Facts.
5. Decree.
6. Petition for Appeal.
7. Order allowing Appeal.
8. Citation and Service.
9. Assignment of Errors.
10. Bond on Appeal.
11. Stipulation for Transcript of Record on Appeal.

The Corporation Commission of the State of Oklahoma, C. C. Childers, Fred Capshaw, E. R. Hughes, Constituting the Corporation Commission of the State of Oklahoma, by E. S. Ratliff, Its Attorney.
Farmers Union Co-operative Gin Company, by Freeling & Box, Its Attorneys.

[fol. 39] The undersigned, Counsel for Appellee, hereby acknowledge service of Appellant's specifications of points upon which they will rely in the Supreme Court, and the designation of portions of the record to be printed, and accepts said designation of portions of record to be printed as calling for the proper record in this case.

Dated this 13th day of July, 1929.

Melton & Melton, Rainey, Flynn, Green & Anderson,
Attorneys for Appellee.

[File endorsement omitted.]

[fol. 40] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 34,585. W. Oklahoma D. C. U. S. Term No. 454. The Corporation Commission of the State of Oklahoma, etc., and Farmers Union Co-operative Gin Company, appellants, vs. William Lowe, doing business under the trade name of Capitol Hill Gin Company. Filed Oct. 22, 1929. File No. 34,585.

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CHARLES ELM

In The Supreme Court of The United States

Corporation Commission of the State of Oklahoma, and Farmers Union Co-operative Gin Company,
Appellants,

vs.

William Lowe, doing business under the trade name of Capitol Hill Gin Company, Appellee.

No. 454
October Term
1929.

PRINTED STATEMENT OF APPELLANT IN ACCORDANCE WITH RULE 12 OF THE COURT

Corporation Commission of the State of Oklahoma,
and
Farmers Union Co-operative Gin Company,
By S. P. FREELING,
Their Attorney.

In The Supreme Court of The United States

Corporation Commission of the State of Oklahoma, and Farmers Union Co-operative Gin Company,
Appellants,

vs.

William Lowe, doing business under the trade name of Capitol Hill Gin Company, Appellee.

No. 454
October Term
1929.

PRINTED STATEMENT OF APPELLANT IN ACCORDANCE WITH RULE 12 OF THE COURT

Complying with Rules 12 and 13 of the Court, the appellants state as follows:

FIRST: The statutory provisions believed to sustain the jurisdiction of the Court are as follows:

Section 345, Title 28, U. S. C. A. (Judicial Code, Section 238, Amended);

Section 380, Title 28, U. S. C. A. (Judicial Code, Section 266, Amended);

Section 861a and 861b, Title 28, U. S. C. A.

The date of the judgment and decree sought to be reviewed was rendered on the 22nd day of June, 1929. (P..30.. Record).

The date on which the application for the appeal was presented was July 20, 1929. (P..37.. Record).

And the order allowing the appeal was dated July 20, 1929. (P..35.. Record).

The nature of the case is as follows:

William Lowe, doing business under the trade name of Capitol Hill Gin Company, filed his bill of complaint against the Corporation Commission of the State of Oklahoma and the Farmers Union Co-operative Gin Company, for preliminary and perpetual injunction. He alleged:

(a) That he was engaged and duly authorized to operate a cotton gin in Capitol Hill in Oklahoma City, under a license duly issued to him by the Corporation Commission under and by virtue of Article 4, Chapter 20 Compiled Laws of Oklahoma, 1921, as amended by Chapter 191 of the Session Laws of Oklahoma, 1923.

(b) That the respondent gin company is a domestic corporation of the State of Oklahoma, organ-

ized and existing under and pursuant to Article XIX of Chapter 34 of the Compiled Statutes of Oklahoma, 1921.

(c) That the suit involved the construction and application of the Constitution and laws of the United States, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of Three Thousand ($3000.00) Dollars.

(d) That by virtue of Section 3712 of Chapter 20 of Article 4, Compiled Statutes of Oklahoma, 1921, cotton gins are public utilities, and the operation of the same is a public business, and that the gin of the complainant is a public utility.

(e) That the Corporation Commission is vested with the power and authority, and is charged with the duty of regulating and controlling cotton gins, to fix rates, rules and regulations to be observed by all persons operating gins within the state.

(f) That under the provisions of Section 3713, Compiled Oklahoma Statutes, 1921, no person is permitted to maintain or operate a gin without having secured a license from the Corporation Commission.

(g) That the respondent gin Company had made an application to the Corporation Commission for a permit and license to operate a gin at a point known as Packingtown, which is a part of Oklahoma City.

(h) The real gist of the bill is found in paragraphs 8, 9 and 10 thereof, which are as follows:

"VIII.

"That the respondent company is organized as a co-operative corporation under the provisions of Article XIX, Chapter 34, Compiled Oklahoma Statutes of 1921, as amended by Chapter 167 of the Session Laws of Oklahoma of 1923, which authorizes ten or more persons to form a corporation for the purpose of conducting, among others, an agricultural or horticultural business upon a co-operative plan; that under said law such corporation is required to apportion, and pay a portion of the profits of the corporation to its members ratably upon the amount of the products sold to the corporation by its members and the amounts of the purchase of members from the corporation, and such corporation is authorized by said law to apportion a part of such profits to non-members of the corporation upon the amounts of their purchases and sales from or to the corporation.

"This law, as construed and applied by said Corporation Commission, authorized respondent company to engage in the business of ginning seed cotton as a public utility under Article IV, Chapter 20, Compiled Oklahoma Statutes 1921, as amended by Chapter 191 of the Session Laws of Oklahoma of 1923.

"IX.

"That the respondent company is not qualified

or competent to receive a license or construct and operate a gin because of the mandatory provisions of the law under which it is organized, requiring it to apportion its profits to its members ratably and empowering it to apportion its profits to its non-members ratably, upon the amount of the products sold to the corporation by its members and the amounts of the purchases by the corporation from its members, and such apportionment of said profits would and does constitute a rebate to said members and non-members upon the charges made by said respondent for ginning the cotton of said members and non-members under rates prescribed by the Corporation Commission and the granting of such rebate would be contrary to the Constitution, laws and public policy of this state and contrary to and in violation of the Constitution, laws and public policy of the United States.

"X.

"That if the respondent gin company is granted a license and permitted thereunder to maintain and operate a gin at Packingtown, Oklahoma, it will do so under more favorable terms than are accorded to complainant, since under the mandatory provisions of the laws of the State of Oklahoma authorizing respondent company's incorporation, it, although engaged in a public business, will be compelled to grant such refund and rebate to its members and have the right and privilege to make such refund and rebate to its non-members or patrons upon the amount of their patronage.

"That your complainant being prohibited from making refunds and rebates and being compelled in the performance of his public duties to charge rates prescribed by the Corporation Commission, will compete with respondent gin company upon unequal terms, and under greater burdens than are imposed upon respondent gin company, in violation of both the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and in violation of Section 10, Article 1 of said Constitution, and should complainant charge lesser rates than those prescribed by said Corporation Commission, he would subject himself to heavy fines and penalties provided for the violation of the Commission's orders and established rates, and would also, by charging less than the prescribed rate or by rebating or refunding a portion of the charge made, violate the laws and public policy of the State of Oklahoma."

The contention was that the 1919 Act (Compiled Statutes of Oklahoma, 1921, Paragraph 5637, et seq.) organized under that Act to engage in the public utility business, denies complainant the equal protection of the law because it permits such corporation to conduct its business on more favorable terms than complainant is permitted to under the law. The pertinent part of the law complained of is found in Section 5648, Compiled Oklahoma Statutes, 1921, of the Act passed in 1919, is as follows:

"The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

Upon a hearing before three judges, as provided by law, the temporary injunction theretofore issued was made permanent, the opinion concerning which will be found in the record at page ..30..

An injunction was prayed in the usual form, and

on June 22, 1929, the court, with three judges sitting, issued the injunction, which, by agreement, was made perpetual, the opinion concerning which will be found in the record, pages ..30.....

We contend that Section 380, Title 28, U. S. C. A., above cited, sustains the jurisdiction of the court. And also the following cases:

Pullman Company v. A. C. Croom, Comptroller of the State of Florida, 34 Sup. Ct. Rep., 182, and cases therein cited.

Respectfully submitted,

Corporation Commission of the State of Oklahoma,
and
Farmers Union Co-operative Gin Company,
By S. P. FREELING,
Their Attorney.

A copy of the above and foregoing printed statement is acknowledged to have been served by the appellants and received by the appellee this, the 18th day of November, 1929.

.....

By .....
His Attorneys

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APR 15
CHARLES ELMORE

No. 454

In The Supreme Court of the United States

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL,
Appellants,

vs.

WILLIAM LOWE, DOING BUSINESS UNDER THE NAME OF THE CAPITOL HILL GIN COMPANY,
Appellee.

BRIEF OF APPELLANTS

S. P. FREELING,
E. S. RATLIFF,
Attorneys for Appellants.

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No. 454

In The Supreme Court of the United States

THE CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, ET AL,
Appellants,

vs.

WILLIAM LOWE, DOING BUSINESS UNDER THE NAME OF THE CAPITOL HILL GIN COMPANY,
Appellee.

BRIEF OF APPELLANT

The pertinent part of the law complained of as found in Section 5648, Compiled Oklahoma Statutes 1929 of the act passed in 1919, is as follows:

"The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time

at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

On April 9th, 1929, the appellee filed his bill in the United States Court for the Western District of Oklahoma, alleging the unconstitutionality of the above law, and praying for an injunction against the appellants, perpetually enjoining them from issuing a license to operate a gin under said authority. (Rec. P. 1).

The case was presented under an agreed statement of facts. (Rec. P. 21).

The final decree in injunction was issued June 22, 1929. (Rec. P. 23).

The Background of the Law Here Assailed Is Found In the History of the Co-operative Movement In the United States, and the Provision Here Challenged Has Been Specifically Sustained by the Courts.

The first steps in the direction of active cooperative effort were taken at the National meeting of the Grange in 1875, at which meeting, what is known as the "Roachdale principles" were adopted. This was the beginning of an effort of the farmers:

(a) To secure a fixed dividend of capital stock;

(b) For doing business with non-members, and

(c) For any remaining dividend to be apportioned on a patronage basis.

Mr. Nourse, in his work, "The Legal Status of Agricultural Co-Operation," gives a complete history of the movement, and in summarizing the effort made at the meeting of the Grange in 1875, concludes his summary with these words:

> "Profits to go, after payment of interest and depreciation, either to increase the capital or business of the association, or for any educational or provident purposes authorized by the association, and the remainder shall be divided among those who have purchased goods from this association during the preceding quarter

(to non-members one-half the proportion of members), in proportion to the amount of purchases during the quarter."

Perhaps the first law passed on the subject was by the State of Michigan in 1865, and was amended in 1875. This will be found on page 40 of Mr. Nourse's Work, and in section 12 of the law it is provided that:

"There shall be such distribution of the profits or earnings of such association among the workmen, purchasers, and stockholders, as shall be described by the by-laws, at such time therein prescribed, and as often at least as once in twelve months."

The movement seems to have grown with great rapidity, and culminated in 1911 by the passage of the Co-Operative Law of Wisconsin, and in his dissenting opinion in the Frost case, Mr. Justice Brandies said:

"Thirty-three States, at least, have enacted laws, providing for the formation of co-operative associations of the stock type. All of them permit a fixed dividend on capital stock, the doing of business for non-members, and the distribution of patronage dividends."

But it seems the Wisconsin law was taken as the type, and has been copied verbatim (or with light and non-essential changes) in Michigan, Minnesota, South Dakota, New York, Kansas, Wash-

ington and Massachusetts, in 1913, Virginia in 1914, Iowa, Wyoming, North Carolina, South Carolina and Oregon in 1915, Rhode Island in 1916, Kentucky in 1918, and Oklahoma in 1919. While the statute of Wisconsin of 1911 was used most widely as a pattern, yet it seems that Minnesota was the distinct pioneer in the field of co-operative legislation. The Wisconsin Law gives specific recognition to the fundamentals of the Roachdale movement, namely, limitation of capital holding, Democratic voting and patronage dividends, and this clause of the Wisconsin law is significant:

> "The directors, subject to revisions by the association at any general or special meeting, shall apportion the earnings by first paying dividends on the paid-up capital stock not exceeding 6 per cent per annum, then setting aside not less than 10 per cent of the net profits for a reserve fund, until an amount has accumulated in said reserve fund, equal to 30 per cent, but when recommended by the directors and voted upon by a majority of the stockholders at an annual meeting or a special meeting for that purpose the same may be increased to 100 per cent of the paid-up capital stock, and 5 per cent thereof for an educational fund to be used in teaching co-operation, and the remainder of said net profits by uniform dividend upon the amount of purchases of shareholders and upon the wages and salaries of employes, and one-half of such uniform dividend to non-shareholders on the

amount of their purchases, which may be credited to the account of such non-shareholders on account of capital stock of the association;"

And in the Co-Operative Law of Minnesota, as amended in October, 1914, the method of profit distribution was arranged in the following manner:

"The net profits of the business of this corporation shall be applied and divided among its shareholders at the end of each business year as follows:

A dividend of not to exceed 7 per cent per annum shall be paid upon the outstanding stock on the date of such dividend.

The remaining balance shall be divided among the shareholders of this corporation pro-rata to the amount of business each has furnished to the company during the year, in the form of furnishing to it the product or products in which it is dealing."

Thus, on examination of the various laws, it will be observed that there may be slight differences in the amount of dividend to be paid on the stock, the amount or per cent used for an educational fund, the per cent of the net profits set aside for reserve fund, but in all essential features they are the same.

This identical question was before the Supreme Court of Minnesota in October, 1917, in

which case the action was brought in the district court to restrain the Farmers Mercantile & Elevator Company, the defendant corporation, from distributing its earnings as patronage dividends, and to restrain it from distributing its dividends in any manner except as to the amount of stock held by the stockholders. The business of the company was the buying, selling, receiving, forwarding and handling of wheat, oats, barley, and other farm products, and also buying and selling coal and other fuel, all at Madison, its place of business. The first statute provided that the profits should be distributed in such manner as "shall be prescribed by the by-laws," but in 1914 this was changed, as above pointed out, to distribute the profits as patronage dividends. The Supreme Court pointed out that according to the provisions of the by-laws, 7 per cent was distributed to the stockholders without discrimination, and the remainder was paid over to such stockholders as had dealt with the company and thereby contributed to its earning power by the sale and delivery to it of their farm products and the purchase of the commodities held by it for sale to the trade, and in the proportion to the business each so contributed to the company.

The plaintiff owned one share of stock, but did not contribute to the business of the company by the sale of his products or otherwise, and after

the adoption of the by-laws, shared only in the seven per cent distribution, and did not share in the profits distributed as patronage dividends, and by this action he challenged the validity of the law, and insisted upon his right to an equal pro rata distribution of the earnings of the company. The lower court found the facts as stated, and held that the by-law was valid, the distribution of the earnings of the company as patronage dividends not a violation of any of the rights of the plaintiff, and rendered judgment accordingly. The syllabus of the case is as follows:

> "A co-operative association under section 6485, G. S. 1913, is authorized by the statute to provide by by-law for the distribution of profits and earnings in such proportion as the stockholders may deem just.
>
> "A by-law which discriminates within reasonable limits between stockholders who deal with the company, thereby increasing its earning power, and those who do not deal with it, HELD not violative of the rights of the stockholders thus discriminated against.
>
> "For several years the company made an equal pro rata distribution of its profits without discrimination; it is HELD, that the custom in this respect, though extending over several years, did not preclude the company from departing therefrom, or deprive it of the right to enact a by-law providing for a different dis-

tribution. No right of the non-assenting stockholders was thereby violated."

And in the body of the opinion it is said:

"The only question presented is whether the method of distributing the earnings of the company as fixed by the by-law violates any of the vested legal or equitable rights of plaintiff. We answer the question in the negative. A co-operative association such as the legislature had in mind in the enactment of the statute under which defendant was incorporated, has been defined to be a 'union of individuals, commonly laborers or small capitalists, formed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each.' *Finnegan v. Noerenberg,* 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. 552.

"The scheme of the corporation is the reciprocal co-operation by the members of the company for their mutual benefit, and in this respect is differentiated from corporations organized for general commercial purposes, or those wherein the pecuniary profits furnish the principal object of the enterprise. The distribution of profits is subject to regulation by the by-laws of the company, and the rights of all shareholders are controlled thereby. The language of the statute is that the 'profits or earnings of such association shall be distributed to those entitled thereto by its by-laws, and in proportions and at the times therein prescribed.' Such general authority as to profit distribu-

tions is not possessed by corporations formed for ordinary commercial purposes."

This case is found in Vol. 138, Minn. Reports, page 199, and reported in 164 N. W. 804, and is referred to by Mr. Nourse in his work on The Legal Status of Agricultural Co-Operation, on page 268 in these words:

> "The other great tenet of Roachdale co-operation, the patronage dividend, was attacked in *Mooney v. Farmers' Mercantile and Elevator Company* (138 Minn. 199, 164 N. W. 804 (1917) by a stockholder who claimed that earnings must be distributed uniformly according to the amount of stock held by each owner. The court ruled that this was not necessary in companies under the co-operative statute, although it was required in ordinary corporations."

The only possible distinction between the association in Oklahoma and that in Minnesota is that in Oklahoma, gins were made public utilities by statute, and in the Frost case they were considered as such, although the point was not decided and our own Supreme Court, in *Choctaw Cotton Oil Company et al v. Corporation Commission,* decided June 1, 1926, specifically said that they did not pass upon the question as to whether the legislature had such authority, but it said that if it had such authority, then it has authority under the doctrine of non-classification to divide operators of cotton gins into different classes and to

prescribe the method by which each class may obtain a corporation license.

Under our view of the law a thing is a public utility in law if it is a public utility in fact, and the declaratory statute of the legislature cannot and does not change the fact, but of course should be persuasive on the subject.

We incline to the view, as above stated, that gins in Oklahoma are public utilities, and surely if they are, the co-operative corporations in Minnesota are public utilities, because their business is the buying, selling, receiving, forwarding and handling of wheat, oats, barley and other farm products, and also buying and selling coal and other fuel, and do as much business with the public as a cotton gin in Oklahoma, and whether the legislature of Minnesota made them public utilities or not would not change the fact that to all intents and purposes they are public utilities even in a greater sense than cotton gins in Oklahoma, for the Minnesota corporation deals in all the products of the farm, and coal and other fuel used in the state.

Assuming that Section 5648 Provides a Different Method for Distribution of Net Profits Among Cotton Growers Patronizing a Cotton Gin Owned by a Co-operative Corporation, Is Such Classification Unconstitutional?

In the Frost case, Supreme Court Adv. Op. Mch. 1, 1929, stress was laid upon the fact that the proviso and amendment of 1925, permitting gins to be operated co-operatively to secure a cotton gin license by the mere presentation of a petition signed by one hundred citizens and taxpayers, did not limit either the stockholders or the beneficiaries to cotton growers. At page 250 of the opinion, Justice Sutherland, speaking for the court, says, with respect to a co-operative corporation organized under the 1919 Act:

> "Its members need not even be cotton growers. They may be—all or any of them —bankers or merchants or capitalists having no interest in the business, differing in any respect from that of the members of an ordinary corporation."

In view of other decisions by the Supreme Court of the United States, it appears to us that this was the underlying reason upon which the opinion of Justice Sutherland was based. This is true for the reason that in a number of other cases involving classification for legislative purposes, similar laws, limited to tobacco growers, cane growers and others engaged in agriculture, have been upheld. See *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102; *Owen County Burley Tobacco Society* v. *Brumback,* 107 S. W. 710; *Commonwealth* v. *Hodges,* 125 S. W. 692;

Dark Tobacco Growers Co-operative Association, et al v. *Dunn*, 266 S. W. 308; *Liberty Warehouse Company* v. *Burley Tobacco Growers Co-operative Association*, United States Supreme Court Advance Opinions, March 1, 1928, page 292 (72 L. Ed); *Crescent Cotton Oil Company* v. *Mississippi*, 257 U. S. 129, 66 L. Ed. 166.

We have cited the above cases in support of our statement, for the reason that the issues here involved, and the statute involved, Section 5648, C. O. S. 1921, which permits distribution of profits, is limited to cotton growers. No others whatsoever are permitted to enjoy the benefits, if any, of the distribution of surplus profits. Such a classification is supported by the decisions of all the courts of which we have any knowledge.

As was stated by Mr. Justice McReynolds, in the case of *Liberty Warehouse Company* v. *Burley Tobacco Growers Co-operative M. Association*, supra:

> "The opinion generally accepted — and upon reasonable grounds, we think—is that the co-operative marketing statutes promote the common interest. The provisions for protecting the fundamental contracts against interference by outsiders are essential to the plan. This court has recognized as permissible some discrimination intended to encourage agriculture. *American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 95; 45 L. Ed. 102; 105,

21 Sup. Ct. Rep., 43; *Cox* v. *Texas*, 202 U. S. 446, 50 L. Ed. 1099, 26 Sup. Ct. Rep. 671. And in many cases it has affirmed the general power of the states so to legislate as to meet a definitely threatened evil. *International Harvester Co.* v. *Missouri*, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (NS.) 525, 34 Sup. Ct. Rep. 859; *Jones* v. *Union Guano Co.*, 264 U. S. 171, 68 L. Ed. 623, 44 Sup. Ct. Rep. 280. Viewing all the circumstances, it is impossible for us to say that the legislature of Kentucky could not treat marketing contracts between the association and its members as of a separate class, provide against probable interference therewith, and to that extent limit the sometime action of warehousemen."

The general principles of classification for legislative purposes perhaps is as well stated in the case of *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, in an opinion by Justice Pitney, as it may be stated:

"There is a strong presumption that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience, and that its discriminations are based upon adequate grounds. The equal protection clause does not require that state laws shall cover the entire field of proper legislation in a single enactment. If one entertained the view that the act might as well have been extended to other classes of employment, this would not amount to a constitutional objection.

Rosenthal v. *New York,* 326 U. S. 260, 271, 57 L. Ed 212, 217, 33 Sup. Ct. Rep. 27, Ann. Cas. 1914B, 71; *Patsone* v. *Pennsylvania,* 232 U. S. 128, 144, 58 L. Ed. 539, 543, 34 Sup. Ct. Rep. 281; *Missouri, Kansas & Texas Ry. Co.* v. *Cade,* 233 U. S. 642, 649, 650, 58 L. Ed. 1135, 1138, 34 Sup. Ct. Rep. 678; *International Harvester Co.* v. *Missouri,* 234 U. S. 199, 215, 58 L. Ed. 1276, 1283, 53 L. R. A. (N. S.) 525, 34 Sup. Ct. Rep., 859; *Kookee Consol. Coke Co.* 1. *Taylor,* 234 U. S. 224, 227, 58 L. Ed. 1288, 34 Sup. Ct. Rep. 856; *Miller* v. *Wilson,* 236 U. S. 373, 385, 59 L. Ed. 628, 632, L. R. A. 1015F, 829, 35 Sup. Ct. Rep. 342.

"The burden being upon him who attacks a law for unconstitutionality, the courts need not be ingenious in searching for grounds of distinction to sustain a classification that may be subjected to criticism."

As was stated by Justice McReynolds, in the Liberty Warehouse case, the general power of the states to legislate so as to meet a definitely threatened evil, even though such legislation may discriminate, has been affirmed many times by the Supreme Court of the United States.

The evil of combination cotton ginners and seed crushers, as well as cotton purchasers for the purpose of controlling the price of cotton seed and cotton, is set forth in the answer to the Bill in this case. The Legislature no doubt had that evil in mind at the time it passed the Act of 1919, and

the cotton growers certainly have had it in mind in the organization of co-operative gins throughout the State of Oklahoma for the purpose of engaging in the business of processing their own cotton for market where they may save their seed or sell it if they wish and dispose of their cotton as they may see fit.

In a recent case decided by the Supreme Court of the United States, *People of the State of New York* v. *Zimmerman,* Sup. Ct. Rep. Advance Opinions, Dec. 15, 1928, page 61, in an opinion by Mr. Justice Vandeventer, he points out the rule of classification applicable to legislation designed to suppress a particular evil. The opinion cites the following cases in support of such classification:

Patsone v. *Pennsylvania,* 232 U. S. 138, 58 L. Ed. 539.

Lindsley v. *National Carbonic Gas Co.,* 220 U. S. 61, 55 L. Ed. 369.

Miller v. *Wilson,* 236 U. S. 373, 59 L. Ed. 628.

Radice v. *New York,* 264 U. S. 292, 68 L. Ed 690.

American Sugar Ref. Co. v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102.

Arkansas Natural Gas Co. v. *Railroad Commission,* 261 U. S. 379, 67 L. Ed. 705.

Orient Ins. Co. v. *Daggs,* 172 U. S., 557 43 L. Ed 552.

Tullis v. Lake Erie & Western R. R. Co., 175, U. S. 348, 44 L. Ed. 192.

Petit v. *Minn.,* 177 U. S. 164, 44 L. Ed. 716.

Williams v. *Fears,* 179 U. S. 270, 45 L. Ed. 186.

Quaker City Cab Co. v. *Pennsylvania,* (Decided May 28, 1928) 48 Sup. Ct. Rep. 553, 72 L. Ed. ——.

Perhaps the leading case of this country involving the rights of the holder of a license or franchise against competition, is the case of *Charles River Bridge Co.* v. *Warren Bridge, et al,* 11 Pet. 420. In that case the Charles River Bridge Company held a franchise to operate a toll bridge in the State of Massachusetts. Thereafter the state granted a competitive franchise, by the terms and provisions of which the last bridge authorized became a free bridge in the course of the years, which destroyed the business of the Charles River Bridge Company. Chief Justice Taney pointed out at considerable length the power of the state to grant franchises and to exercise the right of police power, and that the power may be so used as to destroy the valuable franchise formerly granted to another corporation. The court, in dealing with the rights of competitive concerns holding franchises, said:

"The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles River Bridge, nor make the way to it or from it less convenient. None of the faculties or franchise granted to that corporation have been revoked by the Legislature; and its right to take the tolls granted by the charter remains unaltered. In short, all of the franchises and rights of property enumerated in the charter and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge, which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren bridge would have done them any injury or in any degree affected their right of property if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief, it is necessary to show that the Legislature contracted not to do the act of which they complain; and that they impaired, or in other words, violated that contract by the erection of the Warren bridge."

See also:

Beinville Water Supply Co. v. *Mobile,* 186 U. S. 212.

Long Island Water Supply Co. v. *Brooklyn,* 166 U. S. 685.

Bartlesville Electric & Power Co. v. *Bartlesville Int. Ry. Co.,* 26 Okla. 453.

Choctaw Cotton Oil Co., et al, v. *Corporation Commission of Oklahoma, et al,* 247 Pac. 390.

In our opinion, the Supreme Court of the State of Oklahoma, in the case of *Choctaw Cotton Oil Co. et al* v. *Corporation Commission of Oklahoma, et al,* just cited, which involved the co-operative amendment to the Cotton Gin Act, particularly co-operatives, to secure license by the presentation of a petition instead of by showing necessity, has clearly passed upon the rights of cotton ginners with respect to competitive conditions. The Court said:

> "The contention being that the foregoing proviso denies petitioners, of equal protection under the law and takes their property without due process of law, the question necessarily arises, what property rights are taken from petitioners by licensing another gin, under the foregoing proviso? What rights of any kind could the licensing of another gin affect? It does not disturb the property of petitioners, nor prevent the free operation of their gins. The only right which could be affected by such license is the right of petitioners to operate their gin without competition, a right which is not secured to them either by the State or Federal Constitutions; hence, the contention as to taking their property without due process of law cannot be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

In this connection it should be remembered that Section 32 of Art. 2 of the Constitution of the State of Oklahoma, prohibits the granting of perpetuities or monopolies by providing:

> "Perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed."

Section 51 of Art. 5 then provides:

> "The Legislature shall pass no law granting to any association, corporation or individual any exclusive rights, privileges or immunities within this State."

Mr. Pond on Public Utilities (Third Edition), Sec. 203, lays down the same principle, in the following language:

> "Impairment of Franchise Rights by Competition Not Prohibited. That the effect of contracting with or creating another municipal public utility does not violate the contract rights or interests protected by the Constitution where the former company did not secure an exclusive right or franchise, is well expressed in the case of *Revere Water Co.* v. *Winthrop,* 192 Mass. 455, 78 N. E. 497, 207 U. S. 604, 53 L. Ed. 360, 28 Sup. Ct 253, decided in 1906, in the following language:
>
> 'This act was passed to enable the town to supply its inhabitants with water, and whether the public interests would be served

by conferring such authority was for the Legislature to determine. It is manifest that if any independent system might be thus established, the defendant's property would be diminished in value, and its business perhaps destroyed by reason of the competition, but the company under Statutes 1882, page 101, chapter 142, by which it was incorporated, enjoyed no vested rights which gave it immunity from this contingency, or rendered such legislative action unconstitutional. Nor is legislation of this nature an appropriation of private property for a public use without due process of law under the Fourteenth Amendment to the Federal Constitution."

The decisions of the courts of this country upon the question of classification for legislative purposes, are so numerous that it would be impossible to cite or call attention to them all. A consideration, however, of the leading cases discloses the following citations upholding similar, if not, almost the same legislation as that undertaken in this case.

Fidelity Mutual Life Asso. v. *Mettler,* 185 U. S. 308, 46 L. Ed 992.

Hayes v. *State of Missouri,* 120 U. S. 82, 30 L. Ed. 581.

Jessie Norton Torrance Magoun v. *Ill. Trust & Savings Bank,* 170 U. S. 283, 42 L. Ed. 1037.

Missouri, Pacific Ry. Co. v. *Mackey,* 127 U. S. 205, 32 L. Ed. 106.

C. B. & Q. Ry. Co. v. *Iowa,* 94 U. S. 155, 25 L. Ed. 94.

Thomas Watson, et al. v. *Joseph Nevin,* 128 U. S. 578, 32 L. Ed. 544.

Joslyn Mfg. Co. v. *Providence,* 262 U. S. 668.

Crescent Cotton Oil Co. v. *Mississippi,* 257 U. S. 129, 66 L. Ed. 166.

C. R. I. & P. Ry. Co. v. *D. J. Perry,* 259 U. S. 548, 66 L. Ed. 1056.

Middleton v. *Texas Power & Light Co.,* 249 U. S. 152.

Miller v. *Wilson,* 236 U. S. 373, 59 L. Ed. 628.

Citizens Tel. Co. v. *Fuller,* 229 U. S. 327, 57 L. Ed. 1212.

American Sugar Ref. Co. v. *Louisiana,* 179 U. S. 89, 45 L. Ed. 102.

German Alliance Ins. Co. v. *Lewis,* 233 U. S. 389, 58 L. Ed. 1011.

Northwestern Mutual Life Ins. Co. v. *Wisconsin,* 247 U. S. 133, 62 L. Ed. 1035.

Sunday Lake Iron Co. v. *Township of Wakefield,* 247 U. S. 350, 62 L. Ed. 1154.

Omaechevarria v. *Idaho,* 246 U. S. 343, 62 L. Ed. 769.

Granger v. *Douglas Park Jockey Club*, 148 Fed. 513:

Ex Parte Christinson, 43 Fed. 243.

Stebbins v. *Riley*, 268 U. S. 137, 69 L. Ed. 885.

Owen County Burley Tob. Soc. v. *Brumback*, 107 S. W. 710.

Commonwealth v. *Hodges*, 125 S. W. 692.
Dark Tob. Growers Asso. v. *Dunn*, 266 S. W. 308.

Complainant Has Nowhere Shown That the Enforcement of the Challenged Statute Would Deprive Him—Not Another—of Some Right Arising Under the Fourteenth Amendment to the Constitution of the United States Properly Asserted Below.

Southern R. R. Co. v. *King*, 217 U. S. 524, 54 L. Ed. 868.

Standard Stock Food Co. v. *Wright*, 225 U. S. 540, 56 L. Ed. 1197.

Hendrick v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385.

Jeffry Mfg. Co. v. *Blagg*, 235 U. S. 571, 59 L. Ed. 364.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 66 L. Ed. 239.

Tyler v. *Registration Ct. Judges*, 179 U. S. 405, 45 L. Ed. 252.

Turpin v. *Lemon*, 187 U. S. 51, 47 L. Ed. 70.

Hooker v. *Burr*, 194 U. S. 415, 48 L. Ed. 1046.

New York ex rel Hatch v. *Reardon*, 204 U. S. 152, 51 L. Ed. 415.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-op. Assn.*, 72 L. Ed. 294.

Rosenthal v. *New York*, 226 U. S. 260, 57 L. Ed. 212.

Clark v. *Kansas City*, 176 U. S. 114, 44 L. Ed. 392.

William v. *Walsh*, 222 U. S. 415, 56 L. Ed. 253.

M. K. & T. R. R. Co. of Texas v. *Cade*, 233 U. S. 642, 58 L. Ed. 1135.

Thos. Cusack Co. v. *Chicago*, 242 U. S. 526, 61 L. Ed. 472.

Mallinckrodt Chem. Wks. v. *Missouri*, 238 U. S. 41, 59 L. Ed. 1192.

Choctaw Cot. Oil Co. v. *Corp. Com. of Okla.*, 247 Pac. 390.

Lee v. *New Jersey*, 207 U. S. 67, 52 L. Ed. 106.

Aluminum Co. v. *Ramsey*, 222 U. S. 251 56 L. Ed. 185.

Murphy v. *California*, 225 U. S. 623, 56 L. Ed. 1229.

Darnell v. Indiana, 226 U. S. 390, 57 L. Ed. 267.

Interstate Busses Corp. v. *Holyoke St. Ry. Co.*, 273 U. S. 45, 71 L. Ed. 530.

Plymouth Coal Co. v. *Pennsylvania*, 232 U. S. 545, 58 L. Ed. 719.

In the case of *Southern R. R. Co.* v *King*, 217 U. S. 524, 54 L. Ed. 868, supra, the court said:

> "It is a setted law of this court that one who would strike down a state statute as violative of the Federal Constitution, must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him and so operates as to deprive him of rights protected by the Federal Constitution."

Continuing the discussion, the Court said with respect to the rights asserted by appellant:

> "The amended answer contains the general statement that the statute is in violation of the commerce clause of the Constitution and a direct burden upon and impedes interstate traffic and impairs the usefulness of defendant's facilities for that purpose; that it is impossible to observe the statute in carrying mail and in interstate commerce business. But these averments are mere conclusions. They set forth no facts which would make the operation of the statute unconstitutional. • • • • In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer

set up no legal defense and that the demurrer thereto was properly sustained."

In the case of *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 56 L. Ed. 1197, supra, the court said:

> "If it be said that this provision discriminates against one doing a small business, still the appellant wholly fails to show that it is thereby injured and thus entitled to complain. On the contrary, the bill alleges that the appellant 'sells to more than 800 dealers in the State of Iowa, besides a very large number of customers, who buy direct from your orator or through its agents' and that it has been enabled to sell in the State of Iowa during the past year and for a number of years preceding, a quantity of its goods in an amount exceeding $40,000.00 per annum. The case in this aspect falls within the established rule that 'one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution'." (Citing numerous decisions of this court as well as of other courts.)

In the case of *Hendricks* v. *Maryland*, 235 U. S. 610, 59 L. Ed. 385, the court said:

> "If the statute is otherwise valid, the alleged discrimination against residents of the

District of Columbia is not adequate grounds for us now to declare it altogether bad. At most they are entitled to equality of treatment, and in the absence of some definite and unauthoritative ruling by the courts of the State, we will not assume that, upon a proper showing, this will be denied. The record fails to disclose that Hendricks had complied with the laws in force within the District of Columbia, in respect of registering motor vehicles and licensing operators, or that he applied to the Maryland Commissioner for an identifying tag or marker—prerequisite to a limited use of the highways without cost by residents of other states under the plain terms of Section 140 A. He cannot therefore set up a claim of discrimination in this particular. Only those whose rights are directly affected can properly question the constitutionality of a state statute, and invoke our jurisdiction in respect thereto."

In the case of *Jeffery Mfg. Co.* v. *Blagg*, 235 U. S. 571, 59 L. Ed. 364, the court said:

"Much of the argument is based upon the supposed wrongs of the employe, and the alleged injustice and arbitrary character of the legislation here involved, as it concerns him alone, contrasting an employe in a shop with five employes with those having less. No employe is complaining of this act in this case. The argument based upon such discrimination, so far as it affects employes by themselves considered, cannot be decisive; for it is the well settled rule of this Court that it only hears objections to the constitutionality of laws from

those who are themselves affected by its alleged unconstitutionality in the feature complained of."

In the case of *Dahnke-Walker Milling Co.* v. *Bondurant,* 257 U. S. 282, 66 L. Ed. 239, supra, the court said:

> "Besides a litigant can be heard to question a statute's validity only when and so far as it is being or about to be applied to his disadvantage."

In the case of *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-op. Assn.,* 72 L. Ed. 294, supra, the court said:

> "In order to prevail here the warehouse company must show that enforcement of the challenged judgment would deprive it—not another—of some right arising under the Constitution or laws of the United States properly asserted below." (Citing cases supra and others.)

In the case of *Hooker* v. *Burr,* 194 U. S. 415, 48 L. Ed. 1046, supra, the court said:

> "We have lately held (therein following a long line of authorities) that a party insisting upon the invalidity of a statute as violating any constitutional provision, must show that he may be injured by the unconstitutional law before the courts will listen to his complaint. *Tyler* v. *Registration Judges,* 179 U. S. 405, 45 L. Ed. 252, 21 Sup. Ct. Rep. 206; *Turpin v. Lemon,* 187 U. S. 51, 47 L. Ed. 70, 23 Sup. Ct. Rep.

20. If, instead of showing any injury, plaintiff shows that he cannot possibly be injured, he cannot, of course ask the interference of the court."

In the case of *Clark* v. *Kansas City,* 176 U. S. 114, 44 L. Ed. 396, the court said:

> "Of the discrimination between owners of agricultural lands, the Supreme Court of Kansas said the defendants in error cannot be heard to complain. Their lands are not agricultural lands, at least they do not allege them to be such lands; but on the contrary allege that parts of them are used for railroad purposes, and that the remaining portion are vacant and unoccupied lands, held and possessed for railroad purposes. Owning no agricultural lands, the defendants in error are not affected by the discrimination which the statute makes between the different classes of owners of such kinds of lands, and they cannot therefore, be heard to complain on that score."

In the case of *Williams* v. *Walsh,* 222 U. S. 415 56 L. Ed. 253, the court said:

> "There is another answer to the contention. The law cannot be declared invalid at the instance of one not affected by it, and as we have seen, there was no proof before the justice of the peace that plaintiff in error was an importer of powder."

In the case of *Missouri, Kansas & Texas Railway Company of Texas* v. *Cade,* 233 U. S. 642, 58 L. Ed. 1135, supra, the court said:

"So far as the present attack is founded upon the commerce clause and the act to regulate commerce, it is sufficient to say that the judgment under review was not based upon a claim arising out of interstate commerce, and hence plaintiff in error does not bring itself within the class with regard to whom it claims the act in this respect is repugnant to the Constitution and Laws of the United States." Citing numerous decisions of this and other courts.

In the case of *Interstate Busses Corp* v. *Holyoke St. Ry. Co.,* 273 U. S. 45, 71 L. Ed. 530, supra, the court said:

"The terms of the act are not arbitrary or unreasonable. Appellant has not applied for and does not show that it is entitled to have a license from the local authorities or certificate of public necessity and convenience from the department. Plainly, it has no standing to attack the validity of the statute as a violation of the due process clause."

In the case of *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 545, 58 L. Ed 719, supra, the court said:

"We may once more repeat what has been so often said, that one who would strike down a state statute as violative of the Federal Constitution, must show he is within the class with respect to whom the act is unconstitutional, and must show that the alleged unconstitutional feature injures him and so operates as to

deprive him of rights protected by the Federal Constitution. *Southern R. Co.* v. *King,* 217 U. S. 524, 54 L. Ed. 868, 30 Sup. Ct. Rep. 594."

In the case of *Choctaw Cotton Oil Co., et al* v. *Corporation Commission of Oklahoma, et al,* 247 Pac. 390, the court said:

> "The contention being that the foregoing proviso denies petitioners equal protection under the law and takes their property without due process of law, the question necessarily arises: What property rights are taken from petitioners by licensing another gin under the foregoing proviso? What right of any kind could the licensing of another gin affect: nor prevent the free operation of their gins. The only right which could be affected by such a license is the right of petitioners to operate their gin without competition. A right which is not secured to them either by the State or Federal Constitution; hence, the contention as to taking their property without due process of law cannot be sustained. Neither can the contention as to their being denied equal protection under the law be sustained."

Applying this principle to the case now before the court, nowhere in the record is it claimed by appellant that he has been denied anything whatsoever at the hands of the Corporation Commission of the State of Oklahoma under the statute complained of. As a matter of fact, he himself will not know whether he suffers as a result of

the law complained of until at least a reasonable time. He holds at the present time a cotton gin license authorizing him to operate his gins at Capitol Hill and Wheatland. He has not even applied to the Corporation Commission for relief from the condition complained of. He is not a patron himself of either of the gins to be operated, and therefore as a patron entitled to complain as to service, has no standing whatsoever before a court, and particularly no standing to complain of constitutional infringements of his rights as an operator of a cotton gin, left free to operate at his will, subject to regulation, except that he fears competition against which no constitutional provision protects him.

Moreover, permit us to observe here that it is a fundamental principle of equity that an injunction which results in greater loss than that which will be protected by its granting, will not be granted. The farmers of the State of Oklahoma have invested $2,000,000.00 in cotton ginning facilities under this law. Complainant has invested probably $40,000.00 or $50,000.00. Assuming that each stockholder in a co-operative gin owns $100.00 worth of stock, then there would be 20,000 stockholders and farmers affected by the striking down of this law.

It will be observed:

1. That 23 per cent must be earned before there can be what is called a patronage dividend. The Corporation Commission has the power to fix a gin rate, and the probabilities are, and the presumption is that they would not fix a rate so high that an excess of 23 per cent would be earned.

2. It will be noted further that the earnings and profits thus apportioned as patronage dividends do not come from ginning, but from the amount of the products sold to the corporation and the amount of purchases by the corporation from its members.

3. It will be observed further that such earnings and profits in excess of the 23 per cent may be apportioned in part to non-members upon the amount of their purchases or sales if the by-laws so provide. Since there is no allegation in the petition that the by-laws of this corporation so provide, it must be assumed that the by-laws do not so provide, and therefore this feature is eliminated from consideration.

4. It is contended that this patronage dividend is a rebate, and that it is a privilege denied to the plaintiff. We observe, first, that there is no law in the State of Oklahoma against rebates;

that they were permissible under the common law, and our state has not legislated against them.

We observe, secondly, that this is not a rebate as embraced within any definition of the word any time heretofore used.

The Supreme Court of Wyoming, in 228 Pac., page 632, had occasion to consider the question of the cancellation of the license of an agent for giving or selling stock as an inducement to take insurance. It was there contended that the stock so given was a rebate in fact, as it is here alleged that a patronage dividend amounts to a rebate. The Supreme Court of Wyoming said, in the second syllabus of the case:

> 1. Insurance commissioner cannot cancel license of agent for giving or selling stock as an inducement to take insurance.
>
> Under Comp. St. 1920, sec. 5235, forbidding rebates, and giving or selling stocks, etc., as an inducement to insurance, and section 5236, relative to rebates, giving or selling stock as an inducement to take insurance, did not authorize the insurance commissioner to cancel agent's license, under section 5237, authorizing a cancellation of his license on evidence of 'such rebate.'
>
> 2. Words & Phrases—"Rebate" defined.
>
> The word 'rebate' is defined as an allowance by way of discount or drawback; a de-

duction from a gross amount; deduction; abatement; remission or payment back, as, a rebate of interest for immediate payment; a rebate of freight charges; discount; the abatement of interest in consequence of prompt payment; an allowance by way of discount or drawback; deductions from stipulated premiums allowed in pursuance of antecedent contract (citing Words and Phrases, First Series, Rebate).

3. Statute providing for revocation of agent's license to be strictly construed.

Comp. St. 1920, sec. 5237, penalizing an insurance agent for violation of statutes by revoking his license and prohibiting transaction of business by him for one year, is a penal statute, and must be strictly construed.

4. Mandamus—should not be denied to vacate order cancelling insurance agent's license because of expiration of license.

Though an insurance agent's license, wrongfully revoked, would since have expired, if not revoked, mandamus to vacate revocation should not be denied on the ground that it would be altogether ineffectual, where the revocation, if allowed to stand, would continue the disability of the agent for period which might not have expired."

The Supreme Court of Massachusetts, in the case of *Hamor* v. *Eastern R. R. Co.*, 133 Mass. 315-20, said:

"Rebate of interest is a discount of interest, or money not yet due and payable. It is not a payment back of interest due which has been paid."

In the Wyoming case, *supra,* the court said on page 634:

"The relator's alleged offense of selling or offering to sell stock as an inducement to the purchase of insurance is certainly not a 'rebate of premium payable on the policy,' as that phrase or the word 'rebate' is usually understood; nor is it technically a rebate of anything. The word 'rebate' is defined as follows: By the Century Dictionary as meaning 'an allowance by way of discount or drawback; a deduction from a gross amount.' In Webster's New International Dictionary: 'Deduction; abatement, remission or payment back, as, a rebate of interest for immediate payment; a rebate of freight charges.' In Bouvier's Law Dictionary (Rawle's 3d Rev.): 'Discount; the abatement of interest in consequence of prompt payment. An allowance by way of discount or draw back.' In 7 Words & Phrases, First Series, citing State v. Ins. Co., 38 La. Ann., 465, 467, it is said that rebates, in insurance, or deductions from stipulated premiums allowed in pursuance of antecedent contract. And that definition is accepted in the case of *Commissioner* v. *Life Ins. Co.,* 159 Ala. 533, 49 South. 234, where, after referring to it the court said, concerning the phrase, 'rebate of premium payable on the policy' used in a statute similar in that respect to our section 5235.

It is also elsewhere defined as a 'drawback' and 'abatement.' Waiving other considerations possible and leading to the same result, it is too apparent for doubt that the share system created bears no relation to a rebate for the obvious reason that the policy holder must afford, and does, if he secures the share — provided, the consideration for it by particular services to be performed—services of evident value and utility to the safe conduct of the business of the company."

We observe further that there is little probability, and no certainty that any member of this corporation will receive even a patronage dividend, and even if he does, it certainly would not injure the plaintiff in this case. Both parties to this action are subject to the Corporation Commission and its rules. They must gin cotton for whoever brings it, and for such ginning, each customer must be charged exactly the same rate. The plaintiff in this case will gin at the rate fixed by the Commission, and the customer will pay the same price to him as it will pay to the defendant. There is no difference in rate.

Respectfully submitted,

S. P. FREELING,
E. S. RATLIFF,

Attorneys for Appellants.

Receipt is acknowledged of a copy of the above brief this the 4th day of April, 1930.

RAINEY, FLYNN, GREEN AND ANDERSON.

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NO. 454

IN THE SUPREME COURT OF THE UNITED STATES

CORPORATION COMMISSION OF THE STATE OF OKLAHOMA, C. C. CHILDERS, FRED CAPSHAW and E. R. HUGHES, Constituting the Corporation Commission of the State of Oklahoma, and FARMERS UNION CO-OPERATIVE GIN COMPANY, *Appellants*,

vs.

WILLIAM LOWE, Doing Business Under the Name of the Capitol Hill Gin Company, *Appellee*.

Appeal From the District Court of the United States for the Western District of Oklahoma.

BRIEF OF APPELLEE

ROBERT M. RAINEY,
STREETER B. FLYNN,
ALGER MELTON,
Attorneys for Appellee.

RAINEY, FLYNN, GREEN & ANDERSON,
MELTON & MELTON,
Of Counsel.

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vs.

WILLIAM LOWE, Doing Business Under the Name of the Capitol Hill Gin Company, *Appellee*.

Appeal From the District Court of the United States for the Western District of Oklahoma.

BRIEF OF APPELLEE

Statement

On account of the brevity of the statement of the case by appellants we desire to add the following:

This is an appeal from a final decree of a three-judge court convened pursuant to Section 380 of the Judicial Code, permanently enjoining the Corporation Commission of Oklahoma from issuing a license to the appellant, Farmers Union Co-operative Gin Company, to construct and

operate a cotton gin at Packingtown, Oklahoma, and enjoining the gin company from constructing and operating said gin in competition with appellee's cotton gins at Capitol Hill and Wheatland, Oklahoma (R. 23, 24).

The three-judge court consisted of John H. Cotteral, Circuit Judge; John C. Pollock, District Judge, and Edgar S. Vaught, District Judge. There was no written opinion, but the final decree was signed by all of the judges sitting, and is as follows:

"FINAL DECREE—Filed June 22, 1929.

"This cause coming on to be heard upon the application of the plaintiff for a temporary injunction, pursuant to assignment and notice, it is thereupon agreed by counsel for the parties that the cause be also submitted for final decree; and on consideration of the pleadings, stipulation of facts and the arguments of counsel, it is by the court ordered, adjudged and decreed:

"That the defendant, the Corporation Commission of the State of Oklahoma, be and it is hereby perpetually enjoined from issuing a license to the Farmers Union Co-operative Gin Company, a public utility in the State of Oklahoma, to conduct or operate a cotton gin at Packingtown, within or without the corporate limits of the City of Oklahoma, State of Oklahoma, for and upon the ground that by the laws of said state, applicable to said company, said company is required to apportion and pay a part of its net earnings to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the said company, and its directors are authorized, if so provided by its

by-laws, to apportion such earnings and profits to non-members upon the amounts of their purchases and sales from or to said company, and that such requirements upon and privileges of said company, constitute an unreasonable and arbitrary discrimination in competitive ginning business and operations in favor of the said company and against the plaintiff, and would if said license be issued, effect a denial to the plaintiff of the equal protection of the laws, in violation of the Constitution of the United States.

"That the costs of this suit be taxed to and against the defendants.

"To said decree and every part thereof the defendants, and each of them, at the time duly excepted and except.

"Dated June 22, 1929" (R. 23, 24).

The case was submitted upon an agreed statement of facts, which summarized is as follows (R. 21, 22, 23).

That William Lowe is engaged in the business of ginning cotton at Capitol Hill, which is a portion of Oklahoma City, Oklahoma; that he is also engaged in ginning cotton at Wheatland, some ten or twelve miles southwest of Oklahoma City; that the gins owned and operated by complainant are operated under a license duly issued by the Corporation Commission of the State of Oklahoma, under the terms and provisions of Article 40, Chapter 7, Compiled Oklahoma Statutes 1921, as amended by Chapter 191, Session Laws of Oklahoma 1923; that C. C. Childers, Fred Capshaw and E. R. Hughes are the elected, qualified and acting members of the Corporation Commission of the

State of Oklahoma, and that the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00; that the Farmers Union Co-operative Gin Company is a domestic corporation of the State of Oklahoma, organized pursuant to and under Article 19 of Chapter 34, C. O. S. 1921.

That Section 3712, Chapter 20, of Article 4, C. O. S. 1921, declares cotton gins to be public utilities and their operation in the ginning of seed cotton to be a public business; that the Corporation Commission, pursuant to the authority contained in said statute, has promulgated rates and charges for the ginning of seed cotton, applicable to all engaged in the cotton ginning business for the general public; that on the 8th day of March, 1929, the Farmers Union Co-operative Gin Company filed its application with the Corporation Commission for license to operate a cotton gin at a point known as Packingtown, Oklahoma, which is a part of Oklahoma City, and about two and one-half miles from complainant's gin located at Capitol Hill, Oklahoma City, and that the gins owned and operated by complainant, and the proposed gin to be located at Packingtown, would serve the same general cotton producing territory, and will be in competition for the ginning of cotton grown in such territory; that subsequent to the filing of the application by the Farmers Union Co-operative Gin Company for a gin license authorizing it to construct, maintain

and operate a cotton gin at Packingtown, complainant filed its written objection and protest against the granting of said license, alleging that same was not a needed utility, and that the Farmers Union Co-operative Gin Company being organized under the provisions of Article 19, Chapter 34, C. O. S. 1921, as amended by Section 167, Session Laws 1923, is not authorized to be a public utility and to engage in the business of ginning seed cotton under the cotton gin act, and alleging that the issuance of a license to the Farmers Union Co-operative Gin Company to operate its gin as a public utility would result in discrimination and class legislation in favor of applicant and against protestant; that the Corporation Commission has heard the application of the Farmers Union Co-operative Gin Company for said license, as well as the objection and protest of complainant William Lowe, and will, unless restrained and enjoined, issue the license prayed for, authorizing the establishment and operation of a gin at Packingtown.

ARGUMENT

Article 19, Chapter 34, Compiled Oklahoma Statutes 1921, as construed and applied by the Corporation Commission of Oklahoma, as authorizing the Farmers Union Co-operative Gin Company to engage in the business of ginning seed cotton as a public utility under the Cotton Gin Public Utility Act (Sections 3712 to 3718, C. O. S. 1921), denies the complainant the equal protection of the law and due process of law in violation of and contrary to the Fourteenth Amendment to the Constitution of the United States.

The appellants in their assignments of error (R. 25, 26) complain of the decree of the three-judge court in holding that Article 19, Chapter 34, C. O. S. 1921, as amended by Chapter 167 of the Session Laws of Oklahoma 1923, is unconstitutional and void as construed and applied by the Corporation Commission of the State of Oklahoma.

Appellee asserts the correctness of the holding and the validity of the decree.

The statute passed in 1919 (Article 19, Chapter 34, Compiled Statutes 1921, par. 5637, *et seq.*), as construed and applied by the Corporation Commission, authorizes the respondent company to engage in the business of ginning seed cotton as a public utility under Article 4, Chapter 20, Compiled Oklahoma Statutes 1921, as amended by Chapter 191, Session Laws of 1923.

The principles of law governing this case have recently been clearly enunciated by this Court in the case of

Frost v. *Corporation Commission*, 278 U. S. 515.

The cases are alike in that complainants in each operate cotton gins duly licensed by the Corporation Commission under the Cotton Gin Public Utility Act (Sections 3712 to 3718, inclusive, Compiled Statutes 1921), and in that the respondents, co-operative corporations, were organized pursuant to and under the provisions of Article 19, Chapter 34 (Compiled Statutes 1921, par. 5637, *et seq.*), commonly called the Act of 1919, as distinguished from purely co-operative corporations authorized by an Act of the State Legislature passed in 1917 (Compiled Statutes 1921, par. 5599, *et seq.*). In the Frost case it was contended and this Court held, that an amendment to Section 3714 of the Cotton Gin Utility Act made by the Oklahoma Legislature of 1925, which permitted a corporation organized under the 1919 Act to establish a gin by the presentation of a petition signed by one hundred citizens and taxpayers of the community where the gin was to be located, denied complainant the equal protection of the law in contravention of the Fourteenth Amendment to the Constitution of the United States, since he could only secure a gin license or permit by showing that his gin was a needed utility.

It is here contended that the 1919 Act (Compiled Statutes 1921, par. 5637, *et seq.*), as construed and applied by the Corporation Commission as authorizing a corporation organized under that Act to engage in the public utility

business, denies complainant the equal protection of the laws, because it permits, and in fact, compels, such corporation to conduct its business on more favorable terms than complainant is permitted to under the law.

Section 5648, Compiled Oklahoma Statutes 1921, of the Act passed in 1919, provides:

> "The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time at least once in each year in the following manner:
>
> "(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid-up capital stock.
>
> "(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid-up capital stock. Five per cent may be set aside for educational purposes.
>
> "(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

The three-judge court held that the above mandatory provisions under which the respondent gin company must carry on its business unconstitutionally discriminates against complainant and corporations organized un-

der general law (Articles 2, 3 and 4, Chapter 34, Compiled Statutes 1921) engaged in ginning seed cotton as public utilities. If the respondent gin company is granted a license and permitted thereunder to construct and operate a gin in Packingtown, Oklahoma, it will carry on its business under more favorable terms than complainant and corporations not organized under the general statute, since it will be compelled, although engaged in a regulated public business as a public utility, to grant refunds and rebates to its patron members and will have the right and privilege of making such refunds and rebates to non-member patrons upon the amount of their patronage.

Appellee, William Lowe, is prohibited from making refunds and rebates, and is compelled, in the performance of his public duty, to charge rates fixed by the Corporation Commission, which will compel him to compete with appellant gin company upon unequal terms and under a greater burden than is imposed upon appellant gin company. Should appellee attempt to charge lesser rates for ginning seed cotton than those prescribed by the Corporation Commission, he would subject himself to heavy fines and penalties provided for the violation of the Commission's orders and established rates, and would also, by charging less than the prescribed rate, or by rebating or refunding a portion of the charge made, violate the laws and public policy of the State of Oklahoma.

We think the principles announced in the Frost case are decisive in this case, for it was there held:

> 1. "The purpose of the clause in respect to equal protection of the laws is to rest the rights of all persons upon the same rule under similar circumstances. *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37. This Court has several times decided that a corporation is as much entitled to the equal protection of the laws as an individual. *Quaker City Cab Co.* v. *Penna.,* 277 U. S. 389, 400; *Kentucky Corp.* v. *Paramount Exch.,* 262 U. S. 544, 550; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 154. The converse, of course, is equally true. A classification which is bad because it arbitrarily favors the individual as against the corporation certainly cannot be good when it favors the corporation as against the individual. In either case the classification, in order to be valid, 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Airway Corp.* v. *Day,* 266 U. S. 71, 85; *Schlesinger* v. *Wisconsin,* 270 U. S. 230, 240. That is to say, *mere* difference is not enough; the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.' *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis,* 165 U. S. 150, 155; *Louisville Gas Co.* v. *Coleman, supra,* p. 37."

A corporation organized under the 1919 Act. if granted a license to operate a gin, will be doing the same business for the general public and to the same end, namely, that of reaping profits—that is, with reference to the business in which it will be engaged it will be in exactly the same situation as appellee.

So in this case, William Lowe and the Farmers Union Co-operative Gin Company will be similarly situated in carrying on their public utility business of ginning seed cotton at rates prescribed by the Corporation Commission, and to permit the appellant gin company to carry on its business with privileges not accorded the appellee would violate the equal protection clause.

The 1919 Statute, as construed and applied by the Corporation Commission, sanctions an unjust discrimination between the business of respondent corporation and the business of complainant and others similarly situated.

It is well founded in the public policy of the State of Oklahoma, and of the United States, that a public utility is required to treat all customers similarly situated alike in every respect, and an order of the Commission conflicting with this principle is void.

St. Paul Book & Stationery Co. v. *St. Paul Gaslight Co. et al.*, 153 N. W. 262.

Western Union Tel. Co. v. *Call Pub. Co.*, 181 U. S. 92.

Birmingham Water Co. v. *Brown*, 67 So. 613.

Messenger v. *Penn. R. Co.*, 37 N. J. 407.

Messenger v. *Penn R. Co.*, 8 Vroom (N. J.) 531.

Fletcher Cyc. Corp. (1924 Supp.), Sec. 4498, p. 1099.

A public utility cannot discriminate among its cus-

tomers, and, in justification of its unlawful acts, rely upon competition as an excuse.

Interstate C. C. v. *T. & P. R. Co.*, 52 Fed. 187.
Wright v. *U. S.*, 167 U. S. 512
Mencho v *Ward*, 27 Fed. 529.

The proposition that a public utility, whether it be a railroad, gas, water or electric company, must treat all customers similarly situated alike in every respect is so well settled in the law that it is axiomatic.

We quote from a few of the authorities.

In *St. Paul Book & Stationery Co.* v. *St. Paul Gaslight Co. et al.*, 153 N. W. 262, the Court said:

> "We doubt not, the conditions being the same, the price must also be the same. Favoritism in a public service corporation towards some of its patrons, is not tolerated at all."

In Fletcher on Corporations (1924 Supp.), Sec. 4498, p. 1099, it is said:

> "A public service commission having power and authority to fix rates has *no power* to authorize a public service corporation to make unjust discriminations in rates charged consumers for the same or similar service."

See, also:

Salisbury & S. Ry. Co. v. *Southern Power Co.*, 105 S. E. (N. C.) 28.

The common law is in force in Oklahoma. Section 170, Compiled Oklahoma Statutes 1921, reads as follows:

"Force of Common Law. The common law, as modified by constitutional and statutory law, judicial decisions and the condition and wants of the people, shall remain in force in aid of the general statutes of Oklahoma; but the rule of the common law, that statutes in derogation thereof, shall be strictly construed, shall not be applicable to any general statute of Oklahoma; but all such statutes shall be liberally construed to promote their object."

In the case of *Shaffer Oil & Refining Co.* v. *Creek County Gas Co. et al.*, 114 Okla. 258, the Supreme Court of Oklahoma recognized that the common law rule against discriminations was in full force and effect, and cited with approval, among other cases, the case of *Western Union Telegraph Co.* v. *Call Publishing Co.*, 181 U. S. 92.

This 1919 statute as construed and applied by the Commission creates two distinct discriminations; one between the cotton producing patrons who will patronize the appellant gin company as a public utility, and the other between said public utility and the appellee. Under the principles governing public utility law, all the cotton producing patrons of the utility are entitled to the ginning service furnished by appellant at the same rates and on the same terms. The statute does not permit apportionment of the earnings to the members of the corporation upon the amount of stock held by said members in the corporation, but upon the amount of patronage, or business, done by the members with the corporation. For illustration, the ap-

pellant company's capital consists of two thousand shares of the par value of $5.00 per share, and if a patron member of the corporation owned only one share, but ginned three hundred bales of cotton with the corporation out of a total of fifteen hundred bales ginned by said corporation in any one season, he would be entitled to one-fifth of the earnings of the corporation after the eight per cent dividend is paid him and other members on their stock. This would result in materially reducing the price of ginning to him, depending upon the amount of the earnings of the corporation, and would have no relation to the amount or number of shares of the capital stock owned by said member. Another cotton producer similarly situated may gin exactly the same amount of cotton with the corporation, and he would not be entitled to any rebate or apportionment of the earnings, unless the corporation had so provided in its by-laws, which it is not required to do and almost universally does not do. This discrimination is apparent, as one cotton producer would receive the public service for a much lesser charge than the other.

We realize that this is a discrimination of which the appellee, Lowe, cannot complain, except as it affects him. It does not materially affect him. He is not permitted to make these rebates, refunds or apportionments of earnings to his patrons, and although he and the respondent company are similarly situated, and are engaged in the

same business of ginning seed cotton of all producers at the same rate fixed by the Commission, he cannot hold out to the cotton producers as an inducement to patronize his gin that they will receive any rebate or refund; this he is prohibited from doing by the public utility law.

The obvious and natural result is that the cotton producer, whether a member or non-member of the appellant company's corporation, will have every inducement to patronize appellant's gin with the hope, and prospect, that he will receive this rebate or refund, and thereby reduce the price of his ginning below the rate prescribed by law.

It is also a well known fact that there is great and widespread sentiment among farmers to patronize farmers' co-operative organizations. The statute authorizes the appellant corporations and others organized under the 1919 Act to use the word co-operative as a part of the name of the corporation, and prohibits all other corporations from using said name. Section 5651. If the 1919 corporate organizations were truly co-operative there would be no objection to this. This is a great privilege that the appellant corporation enjoys, having as its natural result immense power in drawing the patronage of cotton producing farmers, which privilege is not accorded appellee. There would be no objection to this if the 1919 corporations were purely co-operative and ginned cotton for their members only, but, as held in the Frost case, they are not purely co-operative

organizations, as they will be engaged just like the appellee is in a public service and for the purpose of making money.

It is therefore evident that the appellant corporation has a great privilege that is denied the appellee and that impediments are placed in the way of appellee in conducting his business that are not placed in the way of the appellant corporation similarly situated with respect to its public service.

It is inferentially contended by appellants that the granting of the injunction to the appellee in this case has the effect of striking down the 1919 co-operative statute, which, it is stated, has been adopted in substance in thirty-two States. We do not agree with this contention. The statute is unassailable as applied to ordinary industrial or agricultural organizations other than public utilities. If the Commission had construed the statute as not applying to a public utility (that is, as not authorizing a corporation organized under the statute to engage in the public utility business) we would have no complaint in this case, and possibly that would have been the proper construction of the statute. But appellee's right to an injunction in this case must depend upon the construction and application of the statute as made by the Commission.

For illustration, the Amendment of 1925 to Section 3714, Compiled Oklahoma Statutes 1921 (the Cotton Gin

Public Utility Statute) would doubtless have been sustained in the Frost case if the Corporation Commission and the Supreme Court of Oklahoma had applied it only to purely co-operative corporations authorized by the 1917 statute, for in the opinion this Court said:

> "It is important to bear in mind that the Durant company was not organized under the Act of 1917, but under that of 1919. The former authorizes the formation of an association for mutual help, without capital stock, not conducted for profit, and restricted to the business of its own members, except that it may act as agent to sell farm products and buy farm supplies for a non-member, but as a condition may impose upon him a liability, not exceeding that of a member, for the contracts, debts and engagements of the association, such services to be performed at the actual cost thereof, including a pro rata part of the overhead expenses. Comp. Stats. 1921, par. 5608. Under this exception, the difference between a non-member and a member is not of such significance or the authority conferred of such scope as to have any material effect upon the general purposes or character of the corporation as a mutual association. As applied to corporations organized under the 1917 Act, we have no reason to doubt that the classification created by the proviso might properly be upheld. *American Sugar Refining Co.* v. *Louisiana,* 179 U. S. 89; *Warehouse Co.* v. *Tobacco Growers,* 276 U. S. 71."

Counsel for appellants (pp. 6 to 11 of their brief) discuss teh case of the *Farmers Mercantile & Elevator Co.,* 130 Minn. 199, 164 N. W. 804, in which the Supreme Court of Minnesota sustained a statute of that State authorizing a co-operative association to provide by its by-laws for the distribution of profits and earnings on a patronage basis,

as against the contention of a stockholder that such profits and earnings should be distributed solely to the stockholders in proportion to the amount of stock held by them. In our opinion the case falls short of sustaining, or even having any persuasive effect on the question presented in this case, for the reason that the mercantile and elevator company was not carrying on its business in Minnesota as a public utility. We do not overlook the contention of counsel for appellants (page 11) that a business "is a public utility in law if it is a public utility in fact, and the declaratory statute of the Legislature cannot and does not change the fact." This language is not an accurate statement of the governing principle, as we understand it. As to whether any business is a public utility depends upon the facts and not upon the legislative fiat, which at most is only persuasive. *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522.

The nature of the business and the method of conducting the same by the mercantile and elevator company under consideration in the Minnesota case might have justified the Legislature in declaring it a public utility and regulating it as such, but no such statute existed, and this, we think, was essential. Moreover, no right was asserted under the Constitution of the United States in that case by a person or corporation against another person or corporation engaged in the same business.

CONCLUSION

All that appellee is seeking to do is to require appellant, in order to engage in the ginning business, to either organize under the provisions of the 1917 Act or to organize as an ordinary corporation under the general incorporation statutes of the State. If the former course is pursued, the co-operative corporations will not be public utilities in the true sense, as they will only perform the service of ginning seed cotton for their members. If the latter course is followed, they cannot practice discrimination, nor can they exercise the privileges made mandatory by the 1919 Act, but will be compelled to compete with appellee upon equal terms. This is obviously fair and just.

We respectfully submit that the decree of the United States Court is right and should be affirmed.

ROBERT M. RAINEY,
STREETER B. FLYNN,
ALGER MELTON,
Attorneys for Appellee.

RAINEY, FLYNN, GREEN & ANDERSON,
MELTON & MELTON,
Of Counsel.

APPENDIX

OKLAHOMA STATUTES

Article 19. Co-operative Corporations.

Section 3712, C. O. S. 1921 (Sess. L. 1915):

"Cotton Gins—Declared Public Utility. That cotton gins are hereby declared to be public utilities, and the operation of same for the purpose of ginning seed cotton is declared to be a public business."

Section 3713, C. O. S. 1921 (as amended Ch. 191, p. 340, Sess. L. 1923):

"Cotton Gins—License. 1. No person or persons, or corporation in this State, shall be permitted to maintain and operate a gin for the purpose of ginning seed cotton without first having secured a license for such purpose from the State Corporation Commission, said license to be issued upon proper showing to be made as prescribed by the rules and regulations promulgated by the Commission. The fee for said license issued by the Corporation Commission is hereby fixed at three (3c) per bale, based on the number of bales ginned the previous year as shown by the final report of said gin on file with the Corporation Commission. In case of a new plant or a gin that did not operate the preceding year, a license fee of five dollars ($5.00) per gin stand will be charged, which sums shall be converted into the State Treasury of the State of Oklahoma."

Section 3714, C. O. S. 1921 (Sess. L. 1915, as amended by Sec. 1, Ch. 109, p. 157, Sess. L. 1925):

"Corporation Commission—Licenses. 1. The Corporation Commission, in issuing such license, shall

have the right to take into consideration the necessity for the operation of a gin for such purpose at the place of its location; provided nothing herein shall operate to prevent the licensing of gins now established, except for violation of the provisions of this act or of the rules, regulations and requirements of the Corporation Commission made and promulgated pursuant to this Act. No new gin plants shall be constructed, installed or licensed, or any old gin removed from one point to another until satisfactory showing shall have been made to the Corporation Commission setting forth that such gin is a needed utility, and that the proposed corporation, company, firm or individual is a competent and desirable corporation, company, firm or individual to establish and operate said gin as may appear in the discretion of said Commission; provided, that on the presentation of a petition for the establishment of a gin to be run co-operatively, signed by one hundred (100) citizens and taxpayers of the community where the gin is to be located, the Corporation Commission shall issue a license for said gin. The Commission shall have the right to take into consideration the responsibility and reliability and qualifications as well as the capacity of the person or persons or corporation to do such ginning business so far as to afford all reasonable facilities, conveniences and services to the public, and shall have the power and authority to require such facilities, conveniences and services to be afforded the public. The inspectors provided herein shall be men who have served at least three years in practical and actual gin operation and shall be appointed by the Corporation Commission; that said inspectors shall have the power to make recommendations to the Commission as to the opening or closing of any gin or gins as well as to the affording by such gins of the reasonable facilities, conveniences and services to the public hereinbefore authorized to be required, as well as to make such other reports and recommendations to the Corporation Commission as may,

to said inspectors, appear necessary, reasonable and just."

Section 3715, C. O. S. 1921, as amended by Sec. 3, Ch. 191, Session Laws 1923:

"Same—Power and Authority.

"Section 3. That Section 3715, Compiled Oklahoma Statutes 1921, be, and the same is, hereby amended to read as follows, to-wit: (Sec.) 3715. That the Corporation Commission shall have the same power and authority and be charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of public duties and the charges therefor, and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies, and shall have the same power to fix rates, rules, charges and regulations to be observed by such person or persons or corporation, operating gins and the affording of all reasonable conveniences, facilities and services as it may impose as to transportation or transmission companies. For the purpose of carrying into effect the provisions of this Act, there is hereby created a department of cotton gin utilities under the Corporation Commission. The Commission shall appoint four inspectors of cotton gins, one of whom shall be selected as head of such department, who shall receive a salary of two thousand dollars ($2,000.00) per annum, whose functions, duties and term of office shall be regulated at the discretion of the Commission. There is also provided a stenographer for such Commission, who shall receive a salary of twelve hundred dollars ($1,200.00) per annum. The fiscal year of all cotton gin utilities shall terminate March 31, 1924, and annually each year thereafter, and it shall be the duty of each and every corporation, company, firm or individual owning or operating a cotton gin to file a final

report for the preceding year not later than 30 days following the expiration of said fiscal year. Failure to file said report shall constitute a forfeiture of license and is hereby declared to be a misdemeanor and may be prosecuted as such. Said report to be in accordance with rules and regulations promulgated by the Commission from time to time."

"3717. Regulations—Enforcement of Orders. That in all matters pertaining to the regulation and control of gins and ginning and the business of such, the Commission shall have the same power and authority as is now exercised by it under the law as to any matter pertaining to the public visitation, regulation or control of transportation and transmission companies, and may enforce its orders against any person, firm, company or corporation maintaining or operating a gin or gins, by imposing a fine against them, or either of them, not exceeding $100.00 for the violation of any of its orders."

Article 4. Cotton Ginners and Dealers.

Section 5637, C. O. S. 1921 (as amended by Chapter 167, Session Laws of 1923):

"Corporations Authorized—Purposes. Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, livestock, irrigation, horticultural, mercantile, mining, manufacturing, mechanical, or industrial business upon a co-operative plan, and with their associates, successors and assigns may become and be a body politic and corporate by complying with the provisions of this Act."

Section 5648, C. O. S. 1921:

"Dividends and Profits—Reserve Fund. The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall appor-

tion the net earnings and profits thereof from time to time at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid-up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid-up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of products sold to the corporation by its members, and the amounts of the purchases of members from the corporation provided, that if the by-laws of the corporation shall so provide, the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

Section 5651, C. O. S. 1921:

"Use of Word 'Co-operative.' No person, firm or association, nor any corporation other than such as shall be organized under this Act, shall make use of the word 'Co-operative' in the name under which its or their business is carried on. Whoever shall violate the provisions of this Act shall be punishable by fine of not exceeding one hundred dollars for each offense. The violation of this section may furthermore be enjoined at the suit of any citizen of the State."

Section 5652, C. O. S. 1921:

"Forfeiture of Charter. Any corporation organized under this Act, which fails to comply with all the provisions of this Act, shall thereby forfeit its charter, and the Secretary of State is hereby authorized and directed to recall the charter of any such corporation."

SUPREME COURT OF THE UNITED STATES.

No. 454.—October Term, 1929.

The Corporation Commission of the State of Oklahoma, etc., and Farmers Union Cooperative Gin Company, Appellants, *vs.* William Lowe, doing business under the trade name of Capitol Hill Gin Company.	Appeal from the District Court of the United States for the Western District of Oklahoma.

[May 19, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought by the appellee, William Lowe, to restrain the Corporation Commission of Oklahoma from issuing a license to the Farmers Union Cooperative Gin Company to construct and operate a cotton gin at Packingtown, Oklahoma. The appellee operates a cotton gin at Capitol Hill, Oklahoma City, under a license issued by the Corporation Commission, and the ground of the suit was that the issuing of a license to the Farmers Union Cooperative Gin Company, in view of the privileges with which that company would be able to operate under the applicable statute of Oklahoma, would constitute an injurious invasion of the appellee's business and an unreasonable discrimination against him, thus depriving him of his property without due process of law and denying him the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution.

The District Court, composed of three judges, entered a final decree granting a permanent injunction against the issuing of the license, and the defendants in the suit, the Corporation Commission and the Farmers Union Cooperative Gin Company, have brought this appeal.

Upon the hearing in the District Court there was an agreed statement of facts, from which it appears that the appellant com-

pany is a domestic corporation of Oklahoma, organized under Article XIX of Chapter 34, Compiled Statutes of Oklahoma of 1921; that the company filed with the Corporation Commission an application for a license to operate a cotton gin as a public utility at Packingtown, a part of Oklahoma City; that the place where it was proposed to locate the gin is about two and one-half miles from appellee's gin at Capitol Hill; that the appellee also operates a cotton gin at Wheatland, Oklahoma, about ten miles from the proposed site of the gin of the appellant company; and that these gins of the appellee and of the appellant company would be in the same cotton producing territory and would be in competition. It was also agreed that the appellee had filed with the Corporation Commission his written protest against the granting of the license to the appellant company; that the Corporation Commission had heard the application and considered the objection, and that unless restrained by the Court the Corporation Commission would issue the license to the appellant company and its proposed gin would be put in operation.

The bill of complaint alleged that cotton gins are public utilities under the law of Oklahoma and that the Corporation Commission is vested with authority to regulate them and to fix the rates, charges, and rules to be observed in their operation. There is no controversy upon these points. The dispute grows out of the privileges accorded by statute to the appellant company as a corporation formed to conduct business upon a cooperative plan. Compiled Statutes of 1921, secs. 5637-5652, as amended in 1923. The particular statutory provision involved is found in section 5648, as follows:

"Dividends and profits—reserve fund. The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors, be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation: provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

The precise contention of the appellee is that under this statute, if a license is granted to appellant company, it will be able to carry on its business on more favorable terms than are available to the appellee, since, it is said, it "will be compelled, although engaged in a regulated public business as a public utility, to grant refunds and rebates to its patron members and will have the right and privilege of making such refunds and rebates to non-member patrons upon the amount of their patronage". The appellee argues that he is prohibited from making refunds and rebates, and is compelled, in the performance of his public duty, to charge rates fixed by the Corporation Commission, which will compel him to compete with appellant gin company upon unequal terms."

In *Frost* v. *Corporation Commission of Oklahoma*, 278 U. S. 515, the Court concluded that one who had complied with the statutes of Oklahoma and had obtained a permit to operate a cotton gin, held a franchise which constituted a property right, and that while this right did not preclude the State from making similar valid grants to others, it was an exclusive right as against attempts to operate a competing gin without a permit or under a void permit. In this view, it was decided that a state statute which permitted an individual to engage in such a business only upon his first showing a public necessity, but allowed a corporation to engage in the same business, in the same locality, without such a showing, discriminated against the individual in violation of the equal protection clause of the Fourteenth Amendment. The appellee invokes the principle of this decision upon the ground that in the present case he will be subject, under the state law, to an unjustifiable discrimination in the competition which will ensue if a license is granted to the appellant company.

The appellants take issue with this contention. They urge, in substance, that at best the appellee's complaint is premature, that he has not yet suffered, and does not know that he will suffer, any injury as a result of the statutory provision of which he complains.

But if the appellant company, by virtue of the statute, is placed on a more favorable basis in the conduct of its business, by being able to hold out to its patrons the prospect of returns which the appellee by reason of the law binding upon him cannot offer to his patrons, it is apparent that the injury of this discrimination may be inflicted at the outset.

Assuming that the complaint is not premature in this respect, and that the discrimination, if it exists under the law, would be immediately effective, we are brought to the question whether the appellee is prevented by the law of Oklahoma from offering, and actually making, a distribution of profits to his patrons similar to that permitted by the statute in the case of the appellant company. The appellee is an individual, transacting business as such, as his bill of complaint shows, and he is not bound by provisions governing corporate organization. He must conduct the business of cotton ginning in conformity with the law of the State, but he may deal with the profits of that business as he sees fit, if he does not act contrary to that law. The question is not as to the mere economic advantage or disadvantage to an individual owner of a cotton gin of a distribution of net earnings upon a basis similar to that permitted by the statute in the case of the appellant company, or of the mere disinclination of an individual owner to make such a distribution. The question is whether the appellant company has a privilege under the statute in this respect which the law of the State refuses to the appellee and hence the appellee is denied the equal protection of the laws.

The statutes of Oklahoma characterize the business of cotton ginning as a "public business", and provide that the Corporation Commission "shall have the same power and authority and be charged with the duty of regulating and controlling such cotton gins in all matters relating to the performance of public duties and the charges therefor and correcting abuses and preventing unjust discrimination and extortion, as is exercised by said Commission as to transportation and transmission companies and shall have the same power to fix rates, rules, charges and regulations to be observed by such person or persons or corporation operating gins and the affording of all reasonable conveniences, facilities and services as it may impose as to transportation or transmission companies". Compiled Statutes of Oklahoma of 1921, secs. 3712,

3715, as amended. Under this authority, the Corporation Commission establishes rates and charges for the ginning of seed cotton, and it is agreed that these rates are applicable to all engaged in the cotton ginning business for the general public. There is no basis for an assumption that there will be any difference in rates and charges as applied to the appellee and the appellant company for similar services.

With respect to the distribution of net earnings, the Corporation Commission and the appellant company have argued "that there is no law in the State of Oklahoma against rebates", and, further, that the so-called "patronage dividend", or a ratable distribution of net earnings to patrons upon the basis of their purchases and sales, as contemplated by the statute in question, "is not a rebate as embraced within any definition of the word as heretofore used". Apart from terminology, the important point is whether, under the law of Oklahoma, appellee may do in his business what the appellant is permitted to do, in distributing net earnings. The appellants, both the Corporation Commission and the company, say that he may.

The question was distinctly raised upon the oral argument of the present case before this Court. Not only was the appellee unable to bring to our attention any provision of the law of the State, or any regulation of the Corporation Commission, denying to the appellee the privilege of distributing net earnings to his patrons upon the basis of purchases and sales in a manner similar to that provided in the statute relating to the appellant company, but the counsel for the Corporation Commission in response to direct inquiry stated to the Court that he knew of no such provision of law or regulation of the Corporation Commission. See *Clark* v. *Poor*, 274 U. S. 554, 557, 558.

It was incumbent upon the appellee in invoking the protection of the Fourteenth Amendment to show with convincing clarity that the law of the State created against him the discrimination of which he complained. An infraction of the constitutional provision is not to be assumed. On the contrary, it is to be presumed that the State in enforcing its local policies will conform its requirements to the Federal guarantees. Doubts on this point are to be resolved in favor of, and not against, the State. *Grenada County Supervisors* v. *Brogdon*, 112 U. S. 261, 269; *St. Louis, Southwestern Railway Company* v. *Arkansas*, 235 U. S. 350, 369;

Hendrick v. *Maryland*, 235 U. S. 610, 621; *Pullman Company* v. *Richardson*, 261 U. S. 330, 340; *South Utah Mines* v. *Beaver County*, 262 U. S. 325, 331.

In the present instance, the authority given to the appellant company by the statute with respect to the distribution of net earnings may be regarded as a declaration that such a distribution of net earnings among patrons of cotton gins is not contrary to, but in accord with, the policy of the State, and, until the contrary appears, the assumption must be that in giving effect to its policy, the State will not permit an injurious and unreasonable discrimination. If, hereafter, in the regulation of his business, the appellee is subject to such a discrimination in violation of his constitutional rights, he will have his appropriate remedy.

The decree of the District Court is reversed and the cause remanded with direction to dismiss the bill of complaint.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.